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VOL. 21

Summaries of
Decisions
Volume 21
(1991)

Commercial Registration Appeal Tribunal



Ontario

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Summaries of Decisions

Volumes 21 and 22 (1991)



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL
SUMMARIES OF DECISIONS* - VOLUMES 21 AND 22

CITED 1991 21 C.R.A.T.
1991 22 C.R.A.T.

- * This volume contains in some instances full decisions and reasons given, and in others, summaries only of Tribunal decisions and Supreme Court of Ontario decisions.
If reference to the exact decision is desired, application should be made to the Registrar.

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Mr. Pleasure Pools	Adjournment and Order (appeal withdrawn)	18 C.R.A.T.	446
<u>Liquor Licence Act</u>			
<u>Name of Establishment</u>			
Babbage's Restaurant	Temporary licence	13 C.R.A.T.	7
Bobby's Jo's Restaurant	Adjournment	7 L.L.A.T.	40
Centennial College of Applied Arts and Technology	Meeting to decide status	5 L.L.A.T.	5
Chick 'n' Deli Restaurant	Meeting to decide status	5 L.L.A.T.	14
Country Place Tavern	LLBO decision a nullity	13 C.R.A.T.	61
Eaters Restaurant	Application denied for leave to appeal LLBO Order	18 C.R.A.T.	440
Fat Albert's Restaurant	Entitlement to hearing	20 C.R.A.T.	589
Firenze Ristorante Italiano	Reasons for Stay	15 C.R.A.T.	255
Frank's Restaurant	Meeting to decide status	6 L.L.A.T.	29
Frosty Muggins Restaurant	Stay denied	18 C.R.A.T.	435
Johnathan's Place Restaurant	Reasons for Stay	15 C.R.A.T.	255
Kelly's Keg'n Jester Tavern	Stay denied	18 C.R.A.T.	443
Lake Abbey Tavern	Specification of parties	7 L.L.A.T.	26

Liquor Licence Act

Name of Establishment (continued)

Orchard Park Tavern	Stay granted	20 C.R.A.T.	580
Piccolo Castello Trattoria Restaurant (Burns Proudfoot) (Piccolo Castello Trattoria Restaurant Ltd)	No jurisdiction Entitlement to require a hearing	13 C.R.A.T.	75 15 C.R.A.T. 270
Orchard Park Tavern	Stay granted	20 C.R.A.T.	580
Pros Restaurant now known as Ocean Queen Restaurant	No jurisdiction	13 C.R.A.T.	80
Restaurant L'Eventail	Meeting to decide status	5 L.L.A.T.	65
Royal Simcoe Lodge Tavern	Adjournment	7 L.L.A.T.	1
Studio One Hotel	Adjournment & stay of LLBO Order reversed	18 C.R.A.T.	433
Studio One Hotel	Adjournment & presiding chairman disqualified himself	18 C.R.A.T.	430
Tramps Restaurant	Adjournment and Consent Order	7 L.L.A.T.	14

Cross Reference Table
Licensee or Applicant

Antonangeli, Angelo (Royal Simcoe Lodge Tavern)	7 L.L.A.T.	1
Colorbar Restaurant Incorporated (Babbage's Restaurant)	13 C.R.A.T.	7
Di Giuseppe, Rocco (Tramps Restaurant)	7 L.L.A.T.	14

Cross Reference Table

Licensee or Applicant (continued)

577029 Ontario Limited and 577030 Ontario Incorporation (Studio One Hotel)	18 C.R.A.T. 430 and 18 C.R.A.T. 433
Hallworth, James David (Frosty Muggins Restaurant)	18 C.R.A.T. 435
Hunter, Allan (Eaters Restaurant)	18 C.R.A.T. 440
Johnathan Place Limited (Johnathan's Place Restaurant)	15 C.R.A.T. 255
Kup, John (Eaters Restaurant)	18 C.R.A.T. 440
Lake Abbey Hotel Inc. (Lake Abbey Tavern)	7 L.L.A.T. 26
Lakeshore Pubs Limited (Kelly's Keg'n Jester Tavern)	18 C.R.A.T. 443
Marrelli, Federico and Yolande (Country Place Tavern)	13 C.R.A.T. 61
North Nottawaga Beach Cottagers Association (Piccolo Castello Trattoria Restaurant)	13 C.R.A.T. 75
Nottawaga Creek Ratepayers Association (Piccolo Castello Trattoria Restaurant)	13 C.R.A.T. 75
Ouzounis, Vasiliios (Pros Restaurant)	13 C.R.A.T. 80
Piccolo Castello Trattoria Ltd (Piccolo Castello Trattoria Restaurant)	13 C.R.A.T. 75
Proudfoot, Burns (Piccolo Castello Trattoria Restaurant)	13 C.R.A.T. 75
Pyl-Chem Hotel Limited	20 C.R.A.T. 580
Scott, James (Piccolo Castello Trattoria Restaurant)	13 C.R.A.T. 75
Sharpe, Charles M. (Frank's Restaurant)	6 L.L.A.T. 29
Silver, Morris and Edith (Centennial College of Applied Arts and Technology)	5 L.L.A.T. 5 5 L.L.A.T. 14 5 L.L.A.T. 65
(Chick 'n' Deli Restaurant) (Restaurant L'Eventail)	
612471 Ontario Limited (Firenze Ristorante Italiano)	15 C.R.A.T. 255 20 C.R.A.T. 589
Smart, John	
373857 Ontario Limited (Bobby Jo's Restaurant)	7 L.L.A.T. 40
Wahnekewening Beach Cottage Owners Association (Piccolo Castello Trattoria Restaurant)	13 C.R.A.T. 75

Mortgage Brokers Act

Haron Investments Inc.
(Nicolas Nicolaides)
(Canadian Financial Services)

Security Mortgages Services
- Silver et al

Admissibility
notice of
further
particulars 12 C.R.A.T. 37

Record of
agreement 11 C.R.A.T. 27

Motor Vehicle Dealers Act

Amato, Pietro
(Pete's Auto Repairs)
Ayton, Michael Valentine

Baldassarre, Antonio

Baldassarre, Antonio

Barrette, Cyril
Centennial Plymouth Chryslers
(1973) Ltd.
(D. Brown Motors (Barrie) Ltd.)
(Gordon D. Coates)

Coward, John D. and
John D. Coward Enterprises
Limited (John D. Coward
Automotive Retailers)

Dueck, Norbert H.

Dueck, Norbert H.
Dueck, Norbert H.

Dueck, Norbert H.

Adjournment 11 C.R.A.T. 33

Extension of
time 10 C.R.A.T. 14

Application
for an Order
granting a Stay
of CRAT Decision
pending the dis-
position of the
Appeal to the
Supreme Court 10 C.R.A.T. 20

Objection to
composition
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Adjournment
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action with
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conditions 18 C.R.A.T. 426

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Stay (to vary a
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Motor Vehicle Dealers Act (continued)

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MacMillan, Donald Neil	Admissibility of information	11 C.R.A.T. 63
McClocklin, Richard Gary (operating as "R - cars")	Granting Stay	12 C.R.A.T. 69
Stephenson, James	Stay denied	11 C.R.A.T. 76

Ontario New Home Warranties Plan Act

Abcon Limited	No jurisdiction	13 C.R.A.T. 160
Ahmed, Mr. and Mrs.	Granting adjournment	17 C.R.A.T. 271
Ahmed, Mr. and Mrs.	Re: costs	18 C.R.A.T. 413
Ashley Oaks Homes Inc.	Order	20 C.R.A.T. 546
Beacom, Bruce	Granting adjournment	12 C.R.A.T. 99
Bertrand, Brent	Granting adjournment	12 C.R.A.T. 102
Bobby Rubino of Canada Limited	Document examination	12 C.R.A.T. 106
Boucher, Bernard and Mary	Granting application to inspect and examine premises	12 C.R.A.T. 113
Brenzel, S. J.	Extension of time	11 C.R.A.T. 81
Bradbury, Construction Limited	Consent Order	13 C.R.A.T. 193
Carleton Condominium Corporation No. 111	Granting adjournment	13 C.R.A.T. 201
Ciulla, Salvatore	Adjournment and Order	20 C.R.A.T. 547
Coventry-Graystone Properties Limited	Extension of time	11 C.R.A.T. 85

Ontario New Home Warranties Plan Act (continued)

Credit Valley Contracting Corp.	NHWP Registrar not allowed to w/d Proposal but req. for postponement granted with terms and conditions	18 C.R.A.T. 423
DeSoto Developments Limited 584745 Ontario Limited (Reliable Construction) Germeney, B. S.	Order 20 C.R.A.T. 548 Adjournment and 20 C.R.A.T. 562 Order Granting adjournment 12 C.R.A.T. 131 Granting Stay of CRAT Order-with condition 17 C.R.A.T. 275 Adjourned 20 C.R.A.T. 564 pending decision in Supreme Court No entitlement to hearing 11 C.R.A.T. 104 Undertaking 13 C.R.A.T. 208	
Greely Custom Homes Ltd	Granting adjudgment 16 C.R.A.T. 289	
Hale, Robert	Adjourned 12 C.R.A.T. 136	
Halton Condominium Corporation No. 41 Harrison, F. Heasman, Reginald	Adjournment 20 C.R.A.T. 570 Conciliation 11 C.R.A.T. 108 Adjourned 20 C.R.A.T. 571 pending decision in Supreme Court Adjournment 20 C.R.A.T. 578 (objection to panel member)	
Heath, Patricia	Authority for Agent to act 12 C.R.A.T. 140	
Hussain, Hannif Jaye, Norman Kozierok, Leon	Granting adjudgment 12 C.R.A.T. 153	
Lacika, Mr. and Mrs. E.	Direction 13 C.R.A.T. 219	
Lall, U.	Granting adjudgment 18 C.R.A.T. 445	
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Ontario New Home Warranties Plan Act (continued)

Rayner, Barry	Granting adjournment	12 C.R.A.T. 193
Reliable Construction (see 584745 Ontario Limited)		
Robitaille, J.	Written notice of claim	12 C.R.A.T. 201
Sapiano, Joseph F.	No jurisdiction	20 C.R.A.T. 583
Scott, Vicki Lynn	Extension of time	10 C.R.A.T. 107
Shah, Ismat	Adjournment (terms and conditions)	20 C.R.A.T. 588
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Wiley, Mr. and Mrs. G.	Order - hearing adj. sine die pending decisions in SCO actions	18 C.R.A.T. 454
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Real Estate and Business Brokers Act

Brandejs, Jan J.	Request for Stay	12 C.R.A.T. 229
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Castle Keep Real Estate Limited - Robinson et al	Clarification	11 C.R.A.T. 146
Cohen, Maurice L.	No jurisdiction	16 C.R.A.T. 288
Dani, Quemal Cam	Compliance with agreement	12 C.R.A.T. 240
Dani Realty Corporation Limited	Order of compliance	12 C.R.A.T. 240
Doherty, Patrick A.	Adjournment granted	18 C.R.A.T. 425
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Real Estate and Business Brokers Act (continued)

Hasfal, Orville A.	No jurisdiction	18 C.R.A.T. 437
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Kornitzer, Dan E.	Request for Stay	17 C.R.A.T. 279
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Morrissey, Joseph A.	Consent Order	13 C.R.A.T. 291
Nimmo, Robert Bruce	Appl'cn. by Applicant for lifting of stay denied	18 C.R.A.T. 448
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Travel Industry Act

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AGS International Travel & Services (Angela Stippinger)	Registrar's Order extended	15 C.R.A.T. 251
Alitours Inc.	No entitlement	13 C.R.A.T. 302
Appleby Travel Service	Suspension lifted	18 C.R.A.T. 416
Ashok Travel Limited	Request for adjournment	10 C.R.A.T. 143
Aslanidis, Steve (See Thessaloniki)		
Bolos Travel Service (Andy Hadjiyannakis)	Adjournment and Order	16 C.R.A.T. 286
Concorde Travel Agency (see 795159 Ontario Inc.)		
Danni International Travel Agency Ltd	Adjournment and Order	12 C.R.A.T. 246
Douglas Travel (See Starburst Holidays)	Consent Order	12 C.R.A.T. 247

Travel Industry Act (continued)

889362 Ontario Ltd. (Sun Holidays)	Extension of expiration of Order	20 C.R.A.T. 556
Hadjiyannakis, Andy (See Bolos Travel)		
Koehler, Susan (See Lifestyle Travel)		
Lawson McKay Tours	Refusal of affidavit evidence	11 C.R.A.T. 206
- Clark et al	No jurisdiction	11 C.R.A.T. 209
- Lowes, Florence	No jurisdiction	11 C.R.A.T. 210
Lifestyle Travel (Susan Koehler)	Adjournment and Order	12 C.R.A.T. 252
Lowes, Florence	Entitlement to hearing	15 C.R.A.T. 267
Manila International Travel Agency Ltd	Suspension	13 C.R.A.T. 303
Manitoba Travel Association		
- Byron's et al	Procedure	11 C.R.A.T. 232
Merivale Travel Agency Limited	Adjournment and Order	20 C.R.A.T. 579
141603 Canada Limited	Order as per settlement	18 C.R.A.T. 453
Penhale Travel Agency	No entitlement	17 C.R.A.T. 281
Professional Seminar Consultants		
- Associated Building Industry of Northern California		
- Brown et al		11 C.R.A.T. 237
- Medical Society of Santa Barbara County		
- Almklov et al		11 C.R.A.T. 240
- Alameda County Dental Society		
Crutcher et al		11 C.R.A.T. 243
- Golden Gate Nurses Association Inc.	Multiple claims	
- Chappel et al	- Adjournment	11 C.R.A.T. 246

Travel Industry Act (continued)

Professional Seminar Consultants			
- Associated Building Industry of Northern California	Affidavit		
- Brown et al	evidence	14 C.R.A.T.	199
- Medical Society of Santa Barbara County	Affidavit	14 C.R.A.T.	199
- Almklov et al	evidence	14 C.R.A.T.	199
- Alameda County Dental Society		14 C.R.A.T.	199
- Crutcher et al		14 C.R.A.T.	199
795159 Ontario Inc. (Concorde Travel Agency)	Extension of expiration of Order	20 C.R.A.T.	585
Starburst Holidays Inc. (Douglas Travel) (Traveler's Tree)	Consent Order	13 C.R.A.T.	361
Stippinger, Angela (see AGS International Travel)			
Sun Holidays (see 889362 Ontario Ltd.)	Adjournment and Order	16 C.R.A.T.	284
Thessaloniki-SKG Travel Service (Steve Aslanidis)			
Traveler's Tree (See Starburst)			
Unitravel Services (see 141603 Canada Limited)		18 C.R.A.T.	453
Value Vacations Limited	No jurisdiction	20 C.R.A.T.	595

CANADIAN CREMATION SERVICES LIMITED

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF THE
FUNERAL DIRECTORS AND ESTABLISHMENTS ACT

TO REFUSE TO ISSUE A LICENCE

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
GORDON R. DRYDEN, Vice-Chairman as Member
PAUL JANISSE, Member

APPEARANCES:

HERMAN TURKSTRA and JOHN LEWIS,
representing the Applicant

RICHARD STEINECKE and JULIA MARTIN,
representing the Registrar of
Funeral Directors and Establishments Act

DATES OF HEARING: 12, 14, 15, 19, November 1991

6, 9 January 1992

Toronto

REASONS FOR DECISION AND ORDER

Since October 1989, Canadian Cremation Services Limited ("CCS") operated a transfer service in the Hamilton area. This business came under the jurisdiction of the Board of Funeral Services when the Funeral Directors and Establishments Act, 1989 came into force on June 1, 1990. CCS applied for a transfer service licence in December 1990. Keven Boyle is the President, owner, proprietor and operator of CCS and he employed his father William H. Boyle and Gail D. Clark in his business.

A "transfer service" is defined in section 1 of the Act as meaning:

a service to the public with respect to the disposition of dead human bodies, including the transportation of dead human bodies and the filling out of the necessary documentation with respect to the disposition of dead human bodies.

The Registrar of the Board of Funeral Services wrote to Keven Boyle on May 13, 1991 and outlined nine reasons why she proposed to refuse to issue a licence. On August 29, 1991,

Canadian Cremation and Burial Services Limited ("CCBS") applied for a transfer service licence and again the Registrar of the Funeral Services Board refused to licence that corporation. On the completion of certain forms and after meetings, the Registrar alleges that the application for CCS was not completed until June 21, 1991.

In his opening statement, counsel for the Registrar said that this hearing concerned both integrity and past conduct. He said that in making arrangements after a death, the survivors are grieving and often elderly so that they are vulnerable to any abuses. Trust funds are often involved and the prices of services and products cannot be easily monitored by those making the arrangements. Counsel for the Registrar reviewed the reasons for refusal in the letters of May 13 and June 4, 1991 which were current and listed the following nine reasons why the Registrar proposed to refuse to grant a licence for a transfer service.

- I. During the period of May 1989 to August 1990 a charge for the holding of remains prior to cremation was applied to transfer service purchases although remains were kept at a hospital at no charge to Canadian Cremation Services Ltd.

May 13 #6

That the services and facilities charge of \$640.00 includes \$50.00 for a holding fee, although the remains were kept at a hospital at no charge to Canadian Cremation Services Ltd.

June 4 #11

He said that the charging of a fee here showed a lack of integrity and this was continued where a "block fee" of the same total amount was continued, while an itemized list again later showed a holding fee.

- II. You have been convicted of a Provincial offence for dishonest conduct.

May 13 #8

He said that this conviction related to the same business albeit under a different corporate name.

- III. You have stolen or have had possession of fracture boards from the Hamilton General Hospital and improperly used them as cremation containers.

May 13 #9

This he said was the most contentious issue and he would show that certain of these boards were found at Keven Boyle's home; that Keven Boyle boasted about using them to cut his overhead and that no one at the hospital asked Keven Boyle to clean these boards nor were they "planted" at his home by a competitor.

- IV. Statements made by Mr. Boyle to the Hamilton Spectator as published in the article of July 7th, 1989, a copy of which is enclosed.

Your handling of the Daws funeral as described in the letter of Reverend Jessie Jansen, a copy of which is enclosed.

June 4 #10,12

Counsel said that the actions of Keven Boyle were in breach of Section 5(1) of the former Funeral Services Act which states:

- 5(1) No person shall engage in or hold himself out as engaging in providing funeral services or funeral supplies or both to the public unless he is licensed as a funeral director under this Act.

"Funeral services" are defined in section 1(d) of that Act as meaning "the services usually provided by a funeral director."

Counsel said that the provision of one service on one occasion was sufficient to breach the Funeral Services Act and that the description of Keven Boyle's business in an article in the Hamilton Spectator, as well as a letter of complaint from Rev. Jessie Jansen supported this reason in that Keven Boyle had illegally held out his services as being appropriate for a transfer service to offer.

- V. The false statements made by Keven Boyle to Sheila Nunn on April 25th, 1991, as specified in the attached memorandum.

June 4 #13

These matters refer to comments alleged to have been made concerning the location and availability of price lists for consumers and the details of trust accounting for prepaid services.

- VI. Since June 1st, 1990, you have operated a transfer service contrary to subsection 19(3) of the Act.

Since June 1st, 1990, you have entered into or offered to enter into prepaid contracts with a purchaser contrary to subsection 30(1) of the Act.

Since June 1st, 1990, you have charged or accepted payment with respect to a pre-arrangement contrary to section 33 of the Act.

June 4 #14,15,16

The references to the Funeral Directors and Establishments Act are:

- 19.(3) No person shall operate or imply that the person is available to operate a transfer service unless,

- (a) the person is licensed to do so; or
(b) the person is licensed to operate a funeral establishment and the transfer service is operated as part of the normal operation of the funeral establishment.

.....

- 30.(1) No person other than a person who is licensed to operate a funeral establishment or a transfer service and who is a participant in good standing in the Compensation Fund shall enter into or offer to enter into a prepaid contract with a purchaser.

.....

33. No person shall charge or accept any payment with respect to a prearrangement.

Counsel said that these sections are clear and no exemptions are set forth. In his view, while Keven Boyle may say that silence from the Funeral Services Board gives him implied consent to continue in business, that is not the correct conclusion to be drawn.

A further letter from the Registrar on August 22, 1991 referred to the six outstanding reasons above and the meeting held on June 18 with Keven Boyle, William Boyle and their counsel at which she, Sheila Nunn and counsel for the Board were present when certain of the other earlier reasons were satisfied.

The letter added a further reason as:

- VII. In letters from the Registrar dated May 13 and June 4, 1991, you were to provide no further services until the licencing question was settled.

At the meeting on June 18, 1991, the Registrar repeated this instruction. You and Mr. William Boyle stated that you understood this, that you had provided only one service since receipt of the Registrar's letter and that had been provided through a licenced funeral director and, finally, that you would not provide services until the licencing question had been settled.

Despite all this, we have been made aware that Canadian Cremation Services Ltd. have continued to provide services to the public. To date, we are aware of more than nine services that have been provided since June 1, 1991.

I am maintaining these items as a reason for proposing to refuse to issue a licence.

Counsel for the Registrar then referred to section 26 of the Act which states:

26. If in the time prescribed therefor or, if no time is prescribed before the expiry

of the licensee's licence, a licensee applies in the manner prescribed for renewal of the licence and pays the fee prescribed, the licence shall be deemed to continue.

- (a) until the renewal is granted; or
- (b) if the licensee is served with a notice that the Registrar proposes to refuse to grant the renewal, until the time for giving notice requiring a hearing has expired and, if a hearing is required, until the Tribunal has made its order.

He noted that Keven Boyle did not have a licence so that continuation could not be a possibility.

Two final reasons were added by the counsel for the Registrar with respect to this Proposal, namely:

VIII. The disposal of the remains of a newborn child.

IX. The method by which Keven Boyle sought business.

Sheila Nunn ("Nunn") is a licensed funeral director since 1985, and joined the Funeral Services Board in November 1986 where she is now the senior Investigator. She spoke of her visits to the CCS office at 70 Ottawa Street in Hamilton on April 25 and May 10, 1991. The proposal letters of the Registrar and the meeting of June 18, as well as the other correspondence were all familiar to her and she presented the details of each of the reasons I through IX.

Concerning Reason I, she first referred to the Coroners Act which requires that 48 hours pass by after a death before cremation can occur. In the result, a holding room is needed where the body is kept during that time. Regulation 370/90 refers to the requirements for transfer service in this regard in paragraph 5:

- 5(1) Every funeral establishment shall have at least one separate room for the holding of dead human bodies and their preparation or placement into caskets or containers.
- (2) Every transfer service shall have a room described in subsection (1) or shall be

able to show it has immediate access to such a room.

On her visit on April 25, she saw that there was no holding room at the CCS premises, and was told by Keven Boyle and William Boyle that they used the room at the Hamilton General Hospital as required without charge. She noted that the accounts of CCS routinely showed a charge to a client account of "Holding and care of remains \$45.00" (Exhibit 9, p.307 and 312)

She said that Keven Boyle and William Boyle acknowledged that in a conversation with the Registrar in 1990, they were told that they could not charge a fee if they had no room, but could do so if they were charged for the use of the room at the Hospital. She then noted that the charge was not made on subsequent accounts but that the overall price for the services of CCS was increased from the former \$595 to \$645; for the approximate same total to a client file. She said that no answer was given to her question as to why the overall price had been increased by \$50 (Exhibit 10, p.325).

A review by Nunn of CCS price lists showed that the price lists dated November 19, 1990 and January 1991 had a block fee for services and facilities of \$640, while the reprinted list of May 19, 1991 which Nunn saw on October 29 removed the holding fee of \$50 and increased the cremation container charge from \$80 to \$130; for a continuing total of \$640.

The matter of the conviction (Reason II) came to Nunn's attention when a review of the general business ledger noted a payment of a fine of \$500. The conviction was obtained on an information laid by Diane L. Middleton, where Keven Boyle was charged with an offence of furnishing false information both in an application and by statement in support of an application on behalf of the Canadian Cremation Society (Peninsula) Inc., Ontario Corporation 833230 for registration as an itinerant seller. The offense was alleged under the Consumer Protection Act R.S.O. 1980, Chapter 87; and Keven Boyle pleaded guilty to both counts.

Nunn referred to a consolidating letter of August 22, 1991 sent by the Registrar to Keven Boyle (Exhibit 5, Tab 2, pages 17-22). The material therein covering the use of fracture boards summarizes the Registrar's position on this Reason III:

I have reason to believe that you had improper possession of fracture boards from the Hamilton General Hospital which may have been used as cremation containers.

You have denied this allegation and sent me a videotape, which I received on July 11, 1991, of an interview between you and local police officers on the subject of the fracture boards. In the tape, you state that you received some fracture boards from the hospital for cleaning and return to the hospital and that you received three other fracture boards from Andrew Fisher to be returned to the Hospital on behalf of the removal service operated by Philip Kiley.

The Hamilton General Hospital does not confirm that you were given fracture boards from the hospital and Mr. Fisher and Mr. Kiley deny that they gave you fracture boards for return to the hospital.

Nunn said that she inspects about one hundred funeral homes in Ontario each year. The information on this issue came from a Halton Regional Police Occurrence and Arrest Report dated April 29, 1991 (Exhibit 13). In this report, William Boyle was charged with possession of stolen property on the complaint of Jim Van Pelt of the Ontario Ministry of Health. The synopsis on the report is as follows:

Victim has noticed a large number of fracture boards have gone missing and their costs to replace are \$71 each. Boards are for ambulance, fire and hospital use. Information received this date, suspect in possession of some boards. Suspect involved in removal (body) services and should not be in possession of the boards. Search warrant executed. Five boards recovered. Advised charge, rights & caution. To be summonsed.

Notes on the Follow-up report gave details of the police visit by Detective W. Bucci and Detective A. Pearce:

Writer and D/Cst. Pearce attended at the suspect's residence on Monday, 29 April 1991 at 1535 hours. We identified ourselves, displayed the original warrant and gave William BOYLE a copy of it. He

was a little stunned, was co-operative and invited me to look through the house.

I went downstairs - no fracture boards located. In the garage area, five fracture boards were located with the top one visible marked "Walkerton Ambulance Service". William BOYLE said that he hadn't seen or noticed the fracture boards before. He said his son, Keven, would know about them and he was in Hamilton.

William Boyle was advised that he was going to be charged with Possession Stolen Property, given rights and the caution. He did not wish to give a statement and was advised he would be getting a summons. Boyle Sr. was co-operative, said he knew we had a job to do and assisted us in placing the fracture boards in our vehicle.

From the Police report, Nunn noted that the five boards had identification on them from the Walkerton Ambulance Service, Parkview Emergency Services, Ancaster Fire Department, Hespeler Arena, and the Niagara District Ambulance.

In her experience, she said that a stretcher with wheels is usually used to transfer bodies and that she had never seen anyone use a fracture board for that purpose. In her discussion with Keven Boyle on June 18, 1991, she recalled his claim that he had these boards from the Hamilton General Hospital for cleaning and eventual return and that three had been brought by Andrew Fisher to his home for return.

Keven Boyle told Nunn that he owned two boards and used them to transfer bodies on occasion. He denied to her that any boards had ever been used in cremations.

These comments were reinforced by the videotape of an interview with Keven Boyle which Detective Bucci made on May 2, 1991. Detective Bucci wrote further in his report:

When the interview was complete, I met with both Boyles. They discussed other concerns about this investigation, in that they had been contacted by several people in the funeral services business. These people had told them they were aware that

the police had executed a search warrant at their house, had recovered stolen property and that they were being charged by Halton police.

The Boyles were very concerned about how persons came to receive this information and how it had spread so quickly. Boyle Jr. had been contacted by Regional Coroner, Dr. Bonnie Porter and was to see her next week. He felt it had something to do with this investigation and wanted to know how she became aware of it.

They also explained to me, a little about the funeral services business in general and said it was a very cut throat business. They asked several times, that I tell them the name of the person who initiated the complaint and who the informant on the search warrant was. I advised them I would not divulge this information to them.

Following the interview, I spoke to Pete Dundas, supervisor Halton-Mississauga Ambulance Services. He confirmed what I had been hearing about fracture boards. There is a heavy exchange of fracture boards between different agencies. Halton Ambulance has or have had in their possession, fracture boards coming from Kanata, Arnprior and Thunder Bay. Fracture boards remain with deceased persons. The next time the ambulance service is at the hospital, they will attempt to recover their own board. If it is not there and they require one, they will take whatever is there.

This results in a heavy interchange of the fracture boards across the Province. They are an item no one really keeps track of. If ambulances need a board, they will just order another one from the Province of Ontario. The Province provides them free to private and public ambulance services funded by the Province.

To this point, my investigation was revealing that the fracture boards were of little interest to the Province or ambulance services. They would be more concerned about expensive equipment and not fracture boards.

After interviews with the "five owners" of the Boards, Detective Bucci concluded:

Writer had reviewed the nature and circumstances pertaining to this investigation. Writer does not feel this is a matter for the criminal courts. No information will be sworn to and no charges will be laid. Writer is exercising his discretion and no criminal proceedings will be initiated.

The underlying nature of this whole investigation, revealed there is a lot of rumours, innuendoes and fingerpointing amongst the body removal services, originating in the Hamilton area. Dealing with these problems will not be resolved by laying any criminal charges in this matter. Nor does the writer feel this is a criminal matter, as no intent has been established or proven.

With respect to Reason IV, Nunn referred to a letter written on July 21, 1989 by the Registrar which went to Keven Boyle. This letter (Exhibit 5, page 23) was in response to the publication of an interview article in the Hamilton Spectator (Exhibit 16). The Registrar wrote:

We are writing to you concerning an article that appeared in the Hamilton Spectator on Saturday, July 8, 1989.

At our recent meeting, you assured me that you understood completely the parameters under which you may operate. Having read the article mentioned (sic) above, I wonder whether you actually do.

The article states several times that the service you provide is a funeral - it is not. You are offering an immediate disposition as an alternative to funeral service.

The article further states that "if a service is to be held it (the casket) is draped with a velvet pall"; "should a client want more than just a disposal, Mr. Boyle will arrange for a chapel service at one of two area crematoriums he has an agreement with. A service costs an extra \$175.00 and he can arrange for a chaplain"; and "Mr. Boyle charged them \$671.00- the extra cost being the brass urn".

All these quotations refer to areas which are not in your jurisdiction. You may,

1. Remove a body from the place of death.
2. Complete the necessary legal documents.
3. Provide a basic container.
4. Transfer the body to the place of final disposition (cemetery or crematorium).

Any service other than these require a properly licenced funeral director.

Finally, we discussed at some length the need for integrity in advertising and the need for caution in quoting prices. You state in the article that "traditional funerals cost about \$4,000.00" and that your service costs \$395.00. You failed to state, however, what was included and/or excluded from either of those figures.

There is a need for the transfer service in Ontario but only for those who can follow the rules.

We look forward to your prompt reply.

Nunn reviewed the complaint of Rev. Jessie Jansen concerning the funeral of the late Flt. Lt. Lee Daws, CD, who died on June 8, 1990 (Exhibit 9, pages 230-234). The information form had the box "Disposition with memorial service" marked and a fee of \$45 was charged for "Holding and care of remains". There was a charge of \$275 for "staff at Service" and \$35.00 for a "Family Registrar" by which was apparently meant "Family Register". Also "Limousines" were charged at \$260.00.

In Nunn's opinion, the provision of limousines, staff at service and a Family Register are all funeral services which Keven Boyle is not allowed to provide. The letter received from Rev. Jansen is repeated and commented upon below as her evidence is reviewed.

Nunn said that this procedure was followed again in the Alfred Raymond Penney case (Exhibit 9, pages 122-124) where a fee of \$45.00 was charged for "Holding and care of remains", and charges were made for chapel service \$225, registration of certificates \$70 and flowers \$115. Then Nunn referred to the John Thomas Rawlings file (Exhibit 9, pages 145-153) where the holding fee was again charged along with charges for chapel service \$325, flowers \$110 and the arrangements for Rev. Gray Rivers were made to conduct the services.

Nunn noted that these three files were all after the letter of July 21, 1989.

In Nunn's opinion, Keven Boyle was providing funeral services as set out in the newspaper article and in Rev. Jansen's complaints and these other two examples.

Nunn said that she had a discussion with Keven Boyle on April 25, 1991 and he asked if he could take cremated remains to a burial site and then leave, and he was told "No". He was told that he could have a body in a container sent to a crematorium chapel and then absent himself, and Keven Boyle said he was doing just that.

Concerning Reason V, Nunn said she asked Keven Boyle on her visit of April 25, 1991 why a price list of services was not at the front door of his premises. She said that he replied that they were not usually kept there. On speaking next with William Boyle, he was surprised by the absence and questioned his son Keven who said that they were usually kept there, but the supply must have run out.

Nunn further said that Keven Boyle told her that the trust accounts were kept in individual certificate deposits, but

on a review of the records this was not true. She said she was then told that a nominal sum of \$10 or \$20 is kept in each account with one large Treasury Bill for the total balances. Then when needed, monies go into the particular account. The totals were all correct she said, but the practice was not satisfactory.

Reason VI outlines three continuing practices which she said were continued after the Registrar wrote to Keven Boyle on May 13, 1991 and stated (Exhibit 5, page 26):

Canadian Cremation Services is presently not licensed to operate as a transfer service and must therefore cease all transfer service operations.

In view of this we request that you send direction to the financial institution holding trust funds for prepaid services informing them that no funds are to be disbursed without the consent of the Board of Funeral Services. Failure to do so would result in action being taken pursuant to Section 4(1) of the Funeral Directors and Establishments Act, 1989.

She also referred to a letter sent by the counsel for the Registrar to Keven Boyle's solicitor on June 5, 1991 which stated:

Furthermore, even if the Registrar's proposal is invalid, Mr. Boyle is not entitled to breach the Act. He cannot practise nor can he enter into prearranged contracts nor may he charge or accept any payment in respect to a prearrangement until he has a licence. Mr. Boyle has been put on notice of this fact. I would urge you to advise your client to immediately.

- (1) cease practising without a licence;
- (2) cease entering into prepaid contracts;
- (3) cease charging or accepting payment with respect to a prearrangement;
- (4) immediately return the money that he holds in trust to the purchasers.

A failure to do so will certainly be raised as an additional reason for refusing a licence to Mr. Boyle before any hearing. It may also result in prosecution of Mr. Boyle or any others in breach of the Act.

Nunn said that this issue of continuing activities was discussed at the general meeting held on June 18, 1991 and both Keven Boyle and William Boyle agreed that they had just one call on behalf of a client which was provided by a licensed establishment and that CCS would not act further until the appeal was completed before this Tribunal.

Nunn stated that there were six clients attended to from May 28 to June 18, 1991, and a total of twenty-one clients attended to up to October 19, 1991 and accordingly this explained the opinion of the Registrar with respect to Reason VII.

Nunn said that every one of the eleven funeral establishments in the Hamilton area provides a transfer service and price lists are readily obtainable from all. She said that there are three separate licence transfer services in Ontario being in Ottawa, Thunder Bay and Toronto with one in Windsor being considered. For Nunn, the dishonesty in the CCS operation is seen in the handling of trust funds, the excessive charges, the failure to provide certain items in agreements and the incorrect completion of legal documents.

On cross-examination, Nunn admitted that her husband is a funeral director. While the former Funeral Services Act may have been somewhat ambiguous in the use of the term "funeral services", she said that the present Act includes in that definition "the care and preparation of dead human bodies and the co-ordination of rites and ceremonies with respect to dead human bodies".

Nunn reviewed the definition of a "transfer service" in the new Act as set out on the first page of this decision.

Accordingly, a transfer service cannot embalm a body and a funeral service is to her anything more than the disposition and the completion of certain documentation. Nunn stated that a transfer service cannot co-ordinate rites and ceremonies because by Regulation 368/90, section 11(2) which states in part:

- (2) An operator of a transfer service or an agent or employee thereof shall not,
- (a) in the course of business, be present at or conduct a visitation or be present at

or participate in the conduct of a funeral;

In reply to a question as to making arrangements as long as the operator or others are not present, she said that the whole range of services must be looked at, and a transfer service can only do what is allowed under section 13 of the said Regulation, namely:

- 13(1) An operator of a transfer service shall transport a dead human body from the place removal was first requested directly to a cemetery or crematorium.
- (2) Unless a dead human body is first embalmed, an operator of a transfer service shall not transport it unless the transportation is effected within seventy-two hours of death or within seventy-two hours from the time it is removed from refrigeration.
- (3) Subsection (1) does not prevent an operator of a transfer service from transporting a dead human body from the place removal was first requested to a temporary holding facility used by the transfer service for that purpose.

Nunn agreed that Keven Boyle's application for a licence as a transfer service was filed on December 11, 1990 and that an inspection was done of his premises by Don Perrault, then the Administrative Inspector of the Board of Funeral Services who is no longer so employed. Nunn said that the Funeral Service Board is a self-funding organization which covers some 2,500 persons in some 520 establishments in Ontario, together with two transfer services which are brought in from the former legislation.

She confirmed that Perrault's main concern was the lack of a holding room at the premises, together with references to contract disclosures and trust account separation and there was no reference in his report to the issues which are now Reasons II, III or V. She further confirmed that there had been no consumer complaints about overcharging or services performed. On her visit to Hamilton on April 25, she was primarily interested in the continued operation of a transfer service without a licence and the lack of a holding room, while other matters appeared in the file by May 13 and further ones by June 4, 1991. She agreed that the totals for the prepaid accounts were accurately recorded, that a

holding room could be constructed as required by Regulation 370 and that price lists were not available at the entrance.

Her knowledge of the fracture board issue came from Sgt. Don Crath, a Hamilton police officer assigned to the Coroner's offices there, and this was after her inspection of April 25. She then spoke with Detective Bucci and eventually saw the Police Report (Exhibit 13), but did not speak about its contents to Keven Boyle, William Boyle or any of the other persons mentioned therein.

Nunn agreed that her opinion on the five boards which had been acquired by Keven Boyle was strengthened after she interviewed Andrew Fisher and Philip Kiley. With respect to Reason II, on cross-examination Nunn stated that Keven Boyle had assisted the Crown attorney and accepted a plea bargain and then was a witness against Pat Markey who, after a 3-day trial had charges against him of knowingly providing false information dismissed.

Paul Peter Swioklo is the morgue attendant at the Hamilton General Hospital and for seven years has done the autopsy paperwork as well as the washing and sewing up of corpses and the cleaning of fracture boards. He said that one or two fracture boards arrive each week with a corpse thereon, and often with broken glass and bodily fluids present. After he cleans the boards with scouring pads, they are stacked in the autopsy room area for reuse. He said that he used to leave the clean boards in the rear garage area, but they were disappearing.

As the boards are interchangeable, he said that often whoever made a delivery would then take a cleaned board away so that the stock moves around with no real concern by those using the boards. He said that two years ago, Keven Boyle asked him who would take those boards and he told him. He said that he has not seen any funeral home or transfer service staff person ever take a board, and that he did not tell Keven Boyle that he could take any boards. He also said that Keven Boyle had stated that he used the hose in the garage to wash off his vehicles and this was of concern as no one else did so. These comments concern Reason III and with respect to Reason IX, he reported a conversation he had with Keven Boyle in which Boyle was alleged to state that "If you give me a cremation there will be something for you". Swioklo took this as a serious attempt to influence him, although he had no authority to direct or refer any business to anyone.

On cross-examination, Swioklo said that an ambulance crew would put an accident victim on a fracture board and a transfer service would bring the victim to the morgue. There are many keys to the garage so that access can be made as required by transfer services, funeral homes, the coroners and police. When asked about

the reference in the Police Report (Exhibit 13) to the videotape interview where Keven Boyle said that "for the past two years he has taken boards home, cleaned them and returned them to the Emergency Department of Hamilton General Hospital", Swioklo clearly denied this saying that no one has ever asked Keven Boyle to do such a thing, that this is Swioklo's job and no contracting out of that task has been done.

Rev. Jessie Jansen has been a United Church Minister for eleven years and is now a hospital chaplain. Her undated letter to the Registrar became part of the development of Reason IV. The letter states (Exhibit 9, pages 232-3):

I am an ordained United Church minister who was called upon by a family to officiate at a memorial/committal service for Mr. Lee Daws, on June 16, 1990 at Strabane United Church, Strabane, Ontario.

I was initially contacted by Mrs. Daws who informed me that the cremation of her husband had been pre-arranged with Hamilton Cremation Services by Mr. Kevin Boyle, and that he would contact me. Mr. Boyle did not, however contact me.

Mr. Daws died on Saturday June 9, 1990 at Joseph Brant Memorial Hospital, Burlington. I was informed of his death the same day by Mrs. Daws. I met with her on Monday morning, June 11, and discussed with her the time of the memorial service and the committal of the ashes. The service was to be held on Saturday morning June 16 at Strabane United Church. It was my assumption that Mr. Boyle would take care of the other arrangements and my impression was that the family thought the same.

I realized later that day, however, that no arrangements were made for opening the grave, contacting the organist or any of the other services usually provided by funeral directors. Subsequently I arranged for the opening of the grave, the organist, setting up for the service etc.

I experienced a lot of uncertainty and decided to call Mr. Boyle to get

clarification. I was assured by him that he would bring the ashes to the church and would carry them to the graveside.

On Saturday morning, June 16, Mr. Boyle was at the church with an assistant. He had provided a limousine for the family, did carry the ashes to the graveside, and gave every appearance of being the funeral director.

My concern is that Mr. Boyle presented himself to the family and to the public as a funeral director, covering up the fact that his licence is limited.

I am also concerned with the fact that, according to Mrs. Daws, she was being charged for the storage of the ashes from Tuesday, June 12 until Saturday June 16 although cremation, according to Mr. Boyle did not take place until Wednesday, June 13.

I sincerely hope that my concerns are unfounded, but I have some uneasy feelings that people are being taken advantage of at a time when they are under a lot of stress and are very vulnerable. It is difficult for families to complain since they often have had no other experiences with funeral directors against which to measure and compare the services offered by Mr. Boyle.

Thank you for your attention.

Rev. Jansen confirmed the contents of her letter. She did not recall if Keven Boyle was present during the service and agreed that the complaint was her own and not that of Mrs. Daws. Her evidence therefore is in support of the Registrar's Reason IV.

Ross Longbottom is a reporter with the Hamilton Spectator and was the author of the article of July 8, 1989 about Keven Boyle (Exhibit 16). He said that three quotations from the article were summaries based upon his interview with Keven Boyle. As counsel referred to them, these were:

In its first two months, the society has performed 12 funerals and been signing an

average of three people per day for prearranged funerals.

Canadian Cremation Society uses a particle board casket, but if a service is to be held it is draped with a velvet pall.

Should a client want more than just a disposal, Mr. Boyle will arrange for a chapel service at one of two area crematoriums he has an agreement with. A service costs an extra \$175 and he can arrange for a chaplain.

He said that later Keven Boyle thanked him for the nice article and no inaccuracies were mentioned.

Ron Steepe ("Steepe") has been a licensed funeral director since 1958 in Waterdown, and was called to give evidence concerning the Registrar's Reason VIII. He has known both Keven Boyle and William Boyle for years and Keven Boyle used to wash and drive vehicles at his funeral home. Steepe was approached on June 6, 1991 to take care of the late Mrs. T. Buckland since the Boyles said that the Board of Funeral Services had told them not to operate and they were obedient. The Board office gave Steepe permission to go ahead and the Buckland family was content since there were no extra charges to the prepaid account for Steepe's services.

On June 18, Keven Boyle called concerning the late Mrs. Marion McKee. This was not a prepaid account, but a referral from a nursing home administrator as there were no direct family members. Steepe sent his own account which was paid. There were two other referrals which were also attended to with the Board office approval, said Steepe.

On cross-examination, Steepe said that he knew of the Registrar being a former employee of the Ontario Funeral Services Association, but that he was not active in the Association's affairs. He said that he had no discussions with the Registrar or other funeral directors about Keven Boyle and accepts the existence of transfer services if the rules are obeyed. For Steepe, the transfer service part would be 5% of his clientele and 2% of his revenue, so that he is content for others to do this work.

Andrew Fisher has completed part of the funeral director's program and worked for four years as an apprentice at a Hamilton funeral home. Since December 1989, he has worked part-time for Philip Kiley who operates a removal service whereby

deceased persons are transported from the place of death to the morgue or to a funeral establishment; and from one community to another, or to or from an airport to a funeral home. He was called to give evidence on Reason III. He said that on a visit to Keven Boyle's home in January 1991, he saw a stack of six or seven fracture boards. He knows that the ambulance services use these, but said that he would only have one if delivering a body thereon from an accident scene. He said that Boyle claimed to have used these boards on six to twelve occasions in cremations "to keep costs down", and that no one else should know of this. He said that while bodies were usually taken to the White Chapel crematorium in a casket or a container case, Keven Boyle delivered them by station wagon in bags on a wheeled stretcher. He said in early April 1991, he visited Keven Boyle's home to look at a pond being constructed and, as he had been asked by the Police to inform them of any suspicious matters, he noted six or seven fracture boards stacked against the interior garage wall. He did not inform Detective Bucci of this and he did not bring any fracture boards to the Boyle residence.

On cross-examination, Fisher said that he began working full time for Philip Kiley in May 1991 and that he has spoken of these events several times with him, and twice with Sgt. Crath. He also spoke of attending a regular funeral director's meeting for the Hamilton area on April 9, 1991 where CCS was discussed as Keven Boyle was trying to join the local group who did not want him as a member. He noted that Philip Kiley and Henry Sieders conduct the two removal services in the Hamilton area and would not want to antagonise their funeral director clients.

Fisher said that a body could be placed in a covering bag while on a fracture board and the bag then sealed; and he agreed that there was a heavy exchange of these boards by ambulance services around Ontario. He said that on several times, Keven Boyle brought to the crematorium a body in a bag without a container and he thinks that a body could be cremated without a container being necessarily there. The crematorium staff would know of any such practice by Keven Boyle, in his opinion.

When Fisher visited the Boyle residence, he looked to see if fracture boards were present and saw them as the garage door was open since others were looking at a car which Keven Boyle had for sale. Fisher said that he had just dropped in to visit Keven Boyle while on his way to pick up a body at the airport and that he did not leave fracture boards there for Keven Boyle to return to the hospital morgue.

Fisher further said on cross-examination that he spoke with Sgt. Crath and was told that the charges were being dropped

because of the "planting" allegations. He said that he and Kiley both visited Detective Bucci who did not want to speak with them further on this matter. Finally he said that he did not know if Keven Boyle kept cremation containers at the White Chapel crematorium and that if he did, the moving of a body on a stretcher would not be surprising.

Philip Kiley ("Kiley") is a funeral director and has operated a removal service since 1977. He said that he would assist Keven Boyle on occasion and he was helped by him in turn. He confirmed his visit to the Boyle residence when he saw the stack of fracture boards with no straps or pouches on them, and said that Keven Boyle told him "We use them to cut down the overhead". Kiley said that at an accident scene, a body thrown from a car would be wrapped in a sheet and then placed in an open vinyl-lined body bag which is strapped to a wheeled stretcher. He said that no one would use a fracture board to transfer a deceased person or for a cremation. He has one board at his business office.

With respect to issue VIII, Kiley said that on visiting Boyle's office to look at a vehicle which was for sale, he noticed a container on the front seat of the unlocked vehicle. When he asked about this, Boyle told him that the box contained the remains of a dead baby which would be taken to the crematorium when convenient.

On cross-examination, Kiley admitted that he was a discharged bankrupt and said that Fisher would pass by the hospital to go to Boyle's house, therefore, Fisher would have no reason to leave fracture boards with Boyle for return if had some. Kiley said that Sgt. Crath had asked both Fisher and himself to check on any fracture boards at Boyle's residence so that a search warrant would not be required. When Fisher told Kiley about the situation, Kiley said that he passed the information on to Sgt. Crath.

With respect to Reason VIII, Kiley said that he was concerned about the box being in an unlocked car on a warm spring day since it could be taken, but that he made no complaint to the Funeral Services Board. He agreed that if he was at the crematorium without an attendant being present, he would know how to start the retort to proceed with a cremation and that there would be nothing left of the container after the cremation was completed.

The first witness for the Applicant was Michael D. Boyle who is Keven's brother and lives with his family just ten minutes away from his parent's home. He has been a firefighter for fourteen years with the Oakville Fire Department and is well aware of fracture boards and their use. He said that he visited his

parent's home the day before the search warrant was executed and saw two fracture boards in the garage. He noticed them because this was not usual and they were something he would recognize. On cross-examination, he confirmed that he had not seen them there before and that if there were more than two he would have asked about it since his fire truck carries four so that a stack of six or seven would have surprised him.

Rev. Wesley Gray River ("Rivers") has been a local United Church clergyman in the Hamilton area for fifty-one years and has known Keven Boyle for some twelve years. Rivers said that he performed funeral services when contacted by Keven Boyle or would recommend other clergy if he was not available. Rivers would contact the family directly to assist in their needs and Keven Boyle would not be at any memorial service. Rivers performed services for other funeral directors in the Hamilton area and had no complaints about Keven Boyle whose character is exemplary so far as he is aware. He said on cross-examination, that the arrangements for the use and time for the White Chapel services were already arranged when he became involved and that any honorarium was received directly from the family and never paid to him by Keven Boyle.

Gail Clark is the part-time office assistant at CCS since July 1990. She spent eleven years with Memorial Gardens of Canada as a sales representative and she makes prearrangements for clients of CCS. She recalled the inspection visit of Don Perrault in February 1991 when Keven Boyle was also present. She recalled the matter of the need for a holding room and that Perrault would enquire as to whether the practice of having a bulk Treasury Bill for the prearrangements was satisfactory or not. She presumed that a licence was likely to be issued but nothing was received prior to the Nunn visit of April 25 when she was not present.

She met with Nunn on May 10 and they reviewed the trust accounting. The Treasury Bill was due on May 8, and it was her intention she said to change to complete individual accounts with their own deposit certificates. New ledgers were created and interest was allocated by each day to each account.

On cross-examination, she agreed that the price list (Exhibit 5, page 67) is current as of May 1, 1991, and that it shows a holding fee of \$50.00. She agreed that the price list (Exhibit 5, page 129) dated May 1991 shows the deletion of the holding fee item while the cremation container fee has gone from \$80.00 to \$130.00 for a same total charge of \$640.00. She said that the cremation container actually costs CCS the sum of \$54.00.

Gary Rogerson is the property manager at White Chapel Cemetery and Crematorium and said that for more than a year, Keven Boyle stored several wooden cremating containers at the crematorium. In Rogerson's view, this style was not rigid enough so that buckling could cause an accident as the container was placed in the retort. A new stronger style was provided, and Rogerson said that no bodies were cremated at White Chapel Crematorium in containers strengthened by a fracture board insert nor were any cremated in bags on a fracture board or with a fracture board inside.

Rogerson stated that his employee at the crematorium helped Keven Boyle place bodies in the containers stored there. He said that only crematorium staff would operate the retort and there are security systems and locks while some training would be needed to control the machinery. As the crematorium containers fit to a body size, there could be no fracture boards inside a container, in his opinion.

Rogerson stated that the employee at the crematorium is one Donald Smith. While Mr. Smith would have been a most useful witness in clearing up the issues of Reason III, the Tribunal notes that he was not called either by counsel for the Registrar or by counsel for CCS.

Sharla Armstrong attended the funeral training course at Humber College in 1989-90, but did not complete the course due to illness. She worked for Philip Kiley from July to December 1990, and assisted him and Fisher in the removal service with many transfers from nursing homes or residences to a funeral establishment. She found Kiley to be ambitious and Fisher to be a willing follower who would lie for Kiley if asked. She has a low opinion of both of them and said that Kiley owes her some wages so she withheld return of a telephone pager.

Keven Boyle ("Boyle") is twenty-seven and lives in Campbellville at his parent's home. His father is William Boyle, a retired business executive who works with him in the CCS business. He has not completed the Funeral Service course, but worked for a year at each of two funeral homes and was a car leasing person at a Burlington dealership. His first evidence was that he had not stolen any fracture boards for his own use and had never cremated a human body on a fracture board.

Concerning the Registrar's Reason II, he said that another person was withdrawing from the removal service in the Hamilton area and a business venture including such a service with a cremation society was an opportunity. He said that this was discussed with Pat Markey, who is not a funeral director but for

three years has been the owner of the Bayview Cemetery and Crematorium and the Florida idea of a direct cremation transfer service was discussed.

Boyle said Pat Markey was to be a silent partner in this new Ontario idea of a transfer service because other funeral directors might be unhappy with the competition and not use the Bayview facilities. In March 1989, Boyle stated that Pat Markey arranged to lease the business premises at 70 Ottawa Street in Hamilton and that his Toronto lawyers would arrange all the registration and legal and banking documents. In April 1989, the forms to organize Canadian Cremation Service (Peninsula) Inc. were provided to Boyle who expected Pat Markey to own 60% of the business and found that his ownership was in the name of Markey's friend, David Herring. A draft shareholder's agreement showed Pat Markey owning 66 and Boyle owning 33 of the 99 shares of the company (Exhibit 29).

Boyle said that his problems with the Ministry of Consumer and Commercial Relations began in September 1989 with the visit of Diane Middleton an inspector, who took, copied and then returned his business files. Another investigator, William MacKinnon also visited Boyle, he said.

He was told that both he and Pat Markey would be charged and by being a witness for the Ministry, he had one charge dropped and paid a minimum fine on his own conviction.

Concerning the Registrar's Reason III, Boyle said that he had used fracture boards in the removal business and bought two in May 1990 (Exhibit 5, tab 3, p.42) in case he needed them. These two have moved on elsewhere as is the practice. He said that disposable body pouches are used with his stretcher and a board could fit inside the bag with a body thereon as can happen at an accident scene. He said that he kept his boards in his family's residence garage where he parked his vehicle overnight.

Boyle said that his statements on the videotape interview (Exhibit 18) are true. No charges were laid and he said that Detective Bucci warned him to be very careful in Hamilton. He recalled the evening visit of Kiley and Fisher for a card game in January 1991, and said that they would have likely entered through the garage as was the normal family practice. He denied that Fisher had been specifically invited to visit and see the pond on April 28, and stated that Fisher had just dropped in unannounced.

He said that on leaving, Fisher noticed the two boards and, when told that they were to go back to the morgue asked Boyle to take three which he had on his vehicle and drop them off to

which Boyle agreed. Boyle said that the morgue closes at 4:30 p.m. and there is only a cold water hose in the garage with no disinfectants available, so that he takes the boards home and cleans them in his own family garage.

Boyle again denied using any boards for cremation in order to save costs and said that their use in cremation would be obvious to the crematorium attendant. He said that he would not know how to use the cremation equipment and that he had kept four containers at White Chapel where on occasion he was allowed to store bodies for the balance of the 48-hour term required by the Coroner's Act.

Boyle referred the Tribunal to an invoice for four cremation containers sent to White Chapel and received by Donald Smith, the crematorium operator. (Exhibit 5, tab 6, p.87)

Boyle said that his normal business practice for a memorial service is to arrange for a chapel location, call a clergy person if needed, set up the casket or remains and flowers and not be present at the service nor supervise any visitation or embalming nor do any dressing of the corpse. He acknowledged that the Registrar had questioned the charge of a holding fee in his accounts.

Concerning the charges made to client accounts for the use of the chapel at the White Chapel crematorium, he said that there was no charge at first but funeral directors were unhappy as he used it several times a month free. As a likely fee of \$175 to \$225 was expected, he charged this as an expense in case a retroactive application of fees for use would be made against him later.

He saw nothing illegal in this practice. He said that Don Perrault had told him that he could place ashes at an interment site and then absent himself during a committal service.

As for the price list issue in Reason V, Boyle presented an invoice (Exhibit 30) and said there is a sign stating "Kindly be advised cremation prices available on request Canadian Cremation Services". This sign was obtained on March 14, 1991 and installed forthwith, he said. He said that while copies of the price list were not always at the front entrance, they are there now.

Boyle reviewed the pink pages in Exhibit 5 which included sixteen letters and cards of appreciation from relatives of deceased clients. He agreed to any audit to compare containers purchased with files of usage and said that after a flood damaged ten corrugated containers, he now uses a better quality of

pressboard "style".

Boyle said that he had not contacted Don Perrault after that visit as he was to expect a reply within two weeks. Since others were slowly being sorted out, Boyle was not concerned as he had no reason to expect a denial. He found Perrault to be much different than Nunn in approach.

The holding room is now completed said Boyle and the Ministry of Health has cleared it for use. He expects that this room will not be often in use as the Hamilton General Hospital morgue is much more convenient.

Boyle acknowledged that the charges of \$10 in Hamilton and \$20 elsewhere for obtaining a death certificate were fees and not disbursements. He said that he was concerned with the Registrar's opposition to his transfer business and spoke with Ron Steepe about this. However, Steepe has a livery service of five funeral coaches and said he could not oppose the wishes of his clients, the other funeral directors in Hamilton.

Boyle said that most of the other funeral services in Hamilton are conglomerates and could pressure White Chapel against him. He presented a letter from Gary Rogerson (Exhibit 31) which is dated May 23 and reads:

We have been told, by the Board of Funeral Services your license has not yet been approved.

Please be advised that as of May 25, 1991 we can no longer except (sic) cases for cremation, from your service.

When your licence has been approved, we would be happy to continue service to you.

Boyle said that the funeral directors in Hamilton hated him, had staff members follow his vehicle, would never assist him and further that his premises had been broken into and merchandise was stolen. He said that he was the topic of every local meeting and that Fisher provided him with the minutes thereof.

Since he could not operate in Ontario, he used a Grimsby coroner friend's advice and arranged to have six to eight cremations done in Niagara Falls, New York. Necessary changes in documentation were made and after Nunn called the crematorium manager who would not provide information to her, the New York

state authorities told the manager not to assist Boyle. Boyle said that he had to deal with clients and tried to have the use of the Guelph Crematorium, but the manager feared retaliation and loss of business from other funeral directors and refused.

By August 1, 1991, Boyle said that he had been in business for two years, had advertised and had 180 files; with a cost of rent and copier lease and Gail Clark's salary. He did not have the resources to last another year without a licence.

Boyle said that there is no other independent cremation transfer service in Hamilton and without him, all persons would then have to go to funeral directors where many want only a simple alternative to that more expensive service.

As to reason VII, Boyle said that he had the remains of the baby on April 22 and had used a proper container.

On cross-examination, Boyle agreed that he had often filed official documents and he was referred to Exhibit 11, page 786 and Exhibit 32 where on statements of death, he had crossed out the words "funeral director". He agreed that he had done so because he was not one.

He was then referred to thirteen Cremation forms at Exhibit 5, tab 9 for the Niagara Falls New York Crematorium, and he had no explanation as to why he had crossed out the words "funeral director" on only one of those forms.

Counsel for the Registrar reviewed with Boyle the application for registration of Canadian Cremation Society (Peninsula) Inc. as an itinerant seller under the Consumer Protection Act (Exhibit 33). Boyle admitted that the entries thereon were in his own handwriting, including reference to David Herring and that ownership was shown to be 51% for himself and 49% for Herring.

He said that he did not realize that this was a Government of Ontario document and that the percentages were put there on Pat Markey's instruction. He did not recall that his conviction was for providing false information and said that his plea of guilty thereto was not truthful. Boyle said that he and Markey parted and that CCS was formed with a new lease and with many of the client files retained.

Boyle said that the holding fee charges were made to client files because he was responsible for the remains. He said further that in May 1991, he began charging a cost for the use of the Whitechapel Chapel of from \$175 to \$225 in case he was

eventually billed for this usage. He agreed that no such billings have ever come to him.

He agreed that there were six transfer services performed after the Registrar told him to stop. One was the Buckland case referred to Steepe as set out above. The other five were New York cremations. He agreed that the deceased died in Ontario; and he met family members and did the paperwork in Ontario for those five services. He further agreed that in the Registrar's letter to his solicitor (Exhibit 5, page 45) on July 17, 1991, the meeting of June 18 was recalled and Boyle's agreement was set out in that "he would provide no services, other than through a licensed funeral director, until the licensing question had been decided".

Boyle said that in the three or four months after June 18, he did 22 transfer services and created 20 new contracts. In his opinion, this was operating only at a limited extent since there was no advertising and these were just referrals.

Concerning Reason IV, Boyle was asked if the newspaper article (Exhibit 5, tab 8) had any errors. He did not recall saying that funerals cost from \$4,000 to \$10,000, or that the chapel service costs \$175.00. He denied using the word "funerals" and said that he had three telephone inquiries per day, but not three contracts signed. In looking at the contract for Flt. Lt. Rawlings, he noted the charge of \$325 for "chapel service" (Exhibit 9, page 153), and said that he gave \$100 to Philip Kiley who assisted him and kept the remainder in case a retroactive chapel fee would ever be asked of him. The further charge of \$110 for flowers did not record his discount which left a net true cost of \$88.00, he admitted.

With respect to the charge of \$325 for the chapel service for Mrs. Margaret Lamb (Exhibit 9, page 163), Boyle could not remember why the charge was made and again he could not explain the charge of \$275 for "Chapel Service and Staff" which is on the Rachael MacLean contract (Exhibit 9, page 204). Boyle said he would consider making refunds for these and other cases.

As for the issue of the fracture boards, Boyle repeated his evidence that he had voluntarily cleaned these and returned them to the Hamilton General Hospital morgue. He agreed that no one had asked him to do this. He made no reply when asked if the washing of these boards with Javex in the family garage would not concern his parents, who with other persons would walk across the garage floor and possibly track into the house the residue from this practice which could lead to risks of disease, as well as to an unsanitary garage drain.

Boyle stated that the evidence of his brother about the two boards being at the home was not passed on to Detective Bucci and he admitted that whoever may own the boards found at his residence, he did not. Boyle denied that any fracture boards were ever used to reinforce the stability of cardboard containers although he agreed that no one would know if, in fact, it was done.

Gail Clark was then recalled to review the reconciliation of containers ordered and used with the records of CCS. She reported that her analysis from May 1989 to December 1990 accounted for all containers, including the two stillborn babies and a service for a Montreal client so that a stock surplus of five containers was seen by her. She agreed that she did not know of the loss of ten containers by flood or just what may have been used for the two stillborn babies. She was also not aware of just how many containers might be kept at the White Chapel crematorium so could not be precise as to whether or not, there would be up to seven, eight or nine containers unaccounted for in total.

She did not know if a payment had to be made to register a death or if any invoices were received from White Chapel crematorium for the use of the chapel after February 19, 1991 or if such invoices would have been paid. She agreed that Boyle has made one repayment, that there are price lists at the entrance now and that Boyle continues to operate his business with Ron Steepe covering the details as the Funeral Services Board is aware.

Evidence in reply on behalf of the Registrar was presented by four witnesses.

Tom Bickell was formerly an employee at White Chapel and said that he discussed a possible chapel use fee with Boyle since others in this large chain of cemetery operations were so doing. He did not recall any retroactivity being discussed and said that Boyle was not told to charge such a fee in case the business policy changed which would be announced by the head office of the chain if it was to occur in due course. He agreed that a retroactive fee was not likely possible since tariff increases would have to go to the Ministry for approval.

Dr. James Young is the Chief Coroner for Ontario and he said that the fracture board issue was only one of the reasons why Boyle's services to the coroners in Hamilton were terminated. No reasons for the termination of services were provided to Boyle's counsel, he said. He reported on a meeting of June 7 where the Regional Coroner for the Hamilton area and his counsel met with Keven Boyle and William Boyle and their counsel. A review of Keven Boyle's services had been made, and the issue of the fracture boards was one of the concerns although not a major one. He said

that there was no guarantee of a one-half share of the area work for Boyle, and that four of the dozen area coroners were content to use Boyle's services.

Dr. Donald McLennan has been a coroner in Grimsby for more than 30 years. He suggested the possible use of the New York crematorium to Keven Boyle when they were discussing business as a local funeral director was using this service. He said that Boyle spoke to him of business pressures due to the police investigation of the fracture boards issue, a complaint about a removal indiscretion and the activities of his competitor, Henry Sieders. He said Boyle did not mention any conspiracy against him by Hamilton area funeral directors. He said that the Regional Coroner instructed him not to use Boyle as a removal service, but he continued in his duty as a coroner to complete cremation certificates for Boyle. He said that he was well satisfied with Boyle's removal service for the year of his usage.

Diane Middleton is an Investigator with the of the Ministry of Consumer and Commercial Relations and has had five years of experience with fifteen earlier years in the Consumer Service Bureau of the Ministry. She recalled a meeting with Keven Boyle on May 18, 1989 when they discussed his plans for a direct disposal service. Since Keven Boyle was not in the guidelines under the new Act, she gave him a registration kit for the Consumer Protection Act as he would be visiting in clients' homes and completing contracts. She said that she explained the application form and requirements for a bond and a trust fund. She further said that she would assist in processing an application since Keven Boyle had funeral service experience, William Boyle was a knowledgeable business man and the project seemed satisfactory.

She said that a bond form was received on June 23 and after a telephone request, the Articles of Incorporation came in on August 17 and the application form on September 21. She noted that the application form showed John David Herring owning 49% of the business and she had never heard of him. On October 11, the Boyles brought in the \$200 application fee.

She recalled a meeting on December 19, 1989 where, after hearing certain rumours, she obtained from Keven Boyle the reasons why Pat Markey's name did not appear on the application. Charges were laid on May 15, 1990, she said as the information on the application was not true.

In his argument, counsel for the Registrar reminded the Tribunal of the test which should routinely be applied in a hearing such as this which is set out in the decision of Richard G. Brenner and the Registrar of Motor Vehicle Dealers and Salesmen (1983) 19

CRAT 58 at 60:

The Registrar proposed to refuse registration because of the existence of the specific circumstances set out in s. 5(1)(b) of the Motor Vehicle Dealers Act. I quote that section:

the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

He then referred to the similar statutory provisions in Sections 20 and 22 of the Funeral Directors and Establishments Act. Therefore in his opinion, the evidence in this application must be sorted and if the findings therefrom show that the Registrar had reasonable grounds for her decision, that decision is to be upheld as the Registrar has the frontline knowledge and responsibility under the Act.

He reviewed the Registrar's nine reasons and gave his conclusions:

Reason I

Holding fees were improperly charged to many files so that clients were misled first by a separate charge then by the inclusion of this amount in a block charge. No error in the price list was raised in the meeting of June 18, and no explanation has been given for this by Keven Boyle. He noted that similar discrepancies bolstered this reason in that Keven Boyle did not pass on his 20% discount in flower purchases, he over charged on the New York accounts for mileage, he led clients to believe that his registration of death fee was a disbursement and he charged for the use of the chapel at Whitechapel as though this was a disbursement when it was not. Keven Boyle has made no reimbursements of any of these overcharges, said counsel, and he has persistently misled his clients so as to lose any credibility.

Reason II

Keven Boyle's conviction of knowingly furnishing false information shows, said counsel, dishonesty and is both recent and relates to this very same business.

While Keven Boyle denied the aspect of "knowingly", counsel said that such a claim is unreasonable as the form was completed by Keven Boyle in his own handwriting.

Reason III

Counsel said the acquisition of the fracture boards by Keven Boyle from the Hamilton General Hospital morgue can only be explained and be reasonable if they were to be put to some further use. The morgue attendant denied giving Boyle any permission to remove boards for cleaning and Boyle's comments on the police videotape are untrue, he said. While ownership of these boards was not of particular concern to the various users, counsel said that the Tribunal can clearly conclude that whoever owned the boards, Keven Boyle did not. Boyle's claim to have used these boards in cremations was told by both Andrew Fisher and Philip Kiley. Counsel said that the discrepancies in the totals of services given and containers bought led to the conclusion that some boards have been used in cremations. Finally he said that the reasons given by Keven Boyle for his washing activities in the garage of his home where family and visitors walk through into the house over possible residues of human liquids which can also be in the drains is simply unbelievable. At the least, Keven Boyle's possession of these fracture boards goes to credibility, honesty and integrity. Counsel would discount any conspiracy to "plant" boards at Keven Boyle's home.

Reason IV

Counsel said that Keven Boyle provided funeral services in contravention of section 5(1) of the former Funeral Services Act. The newspaper article reinforced these proscribed activities and the examples of various files together with the evidence of Rev. Jesse Jansen all showed the various matters to which Keven Boyle attended and for which he improperly or excessively charged.

Reason V

The confusion over the location and availability of price lists was of great interest to Sheila Nunn, said counsel. When added to the structuring of the trust accounts, her concerns developed about unsatisfactory business practices. He said that while these items were not excessively important, they were recent and showed a disregard for truthful actions.

Reason VI

Counsel said that Keven Boyle has clearly disregarded these three provisions in the Act and continued to do so after letters of warning were sent. Finally Keven Boyle carried on with cremations in New York state and believed that he was abiding by the Registrar's prohibitions against carrying on business in Ontario.

Reason VII

Here, counsel said that misrepresentations were given to the Registrar on June 18, 1991 and that at least six calls were attended to by Keven Boyle thereafter although he claimed that only one was.

Reason VIII

The evidence of the newborn remains on the seat of an unlocked car was given by Philip Kiley and Keven Boyle's record show an infant disposal on April 22, 1991. As the event was not independently denied, counsel seeks for the Tribunal to accept this event as at least proof of a poor attitude by Keven Boyle as to his professional responsibilities.

Reason IX

The evidence of Paul Peter Swioklo as to the possibility of being offered an inducement for steering business was cited by counsel as again showing a lack of integrity and honesty in business operations by Keven Boyle.

In summary, counsel said that a pattern of unacceptable conduct was shown by Keven Boyle throughout these nine reasons and that he cannot be trusted to act properly and accordingly that the Registrar has reasonable grounds for belief that the applicant will not operate in accordance with the law and with integrity and honesty as set out in Section 20(3)(b) of the Act. Accordingly the Registrar has refused to grant a transfer licence and the Tribunal should uphold the Registrar's decision, he said.

In summary, counsel for the Applicant decried the allegations of serious criminal activity and stated that the funeral service industry does not want Keven Boyle's transfer business to succeed. He questioned the failure of the Registrar to give evidence and stated that his client is just a young businessman with a poor way of expressing himself.

He suggested that straightforward and honest evidence was given by Gail Clark, Dr. McLennan, Michael Boyle, Rev. Rivers and Ron Steepe. He found everyone else either in government office or in the funeral services industry as opposed to Keven Boyle's plan for a transfer service. The exception for him was Don Perrault who tried to assist and this is the approach which he

believes this Tribunal should undertake as the correct one. Since there have been no consumer complaints, it will be the Hamilton Funeral Directors who benefit from the denial of a licence to his client.

He found the evidence of Sheila Nunn to be unfairly put forward in that she did not attempt to confirm Andrew Fisher's crematorium observations and she relied on his and Philip Kiley's evidence about the fracture boards at Keven Boyle's home when they were competitors. In addition, she did not review the security situation at the crematorium and provided no evidence of the actual usage of any acquired fracture boards in cremations. He concluded that the Registrar is not really serving the consumers of funeral services and that, while there were paperwork errors made by Keven Boyle, he will willingly take further training after the licence is granted to CCS. He said that any errors in behaviour have been severely punished in lost income and expenses; and again no consumers had ever complained.

In reply, counsel for the Registrar cautioned the Tribunal not to rely on any conspiracy theory and to take no notice of the Registrar's failure to testify since there is no requirement to do so. The lack of consumer complaints is readily explained by their inability to learn that they were overcharged.

The Tribunal has carefully considered the evidence brought forward by the Registrar on each of the nine reasons given for the refusal of a transfer licence to CCS. We find that the conspiracy theory advanced by counsel for the Applicant is not proven and that the activities of Keven Boyle have brought upon himself most of the problems which he has.

We find that the Registrar has clearly proven the concerns which are set out in Reasons I, II, IV, VI and VII. We find that the evidence for Reasons V, VIII and IX is less precise. For Reason III, we cannot conclude beyond a reasonable doubt that any fracture boards in whole or in part were used in cremations as the one person who may know was not called as a witness. The boards, however, do appear to have been acquired by Keven Boyle without authority.

Accordingly this Tribunal finds that the Registrar of Funeral Services has fulfilled her onus under Section 20(2)(b) of the Funeral Directors and Establishments Act in denying a transfer licence to Canadian Cremation Services Ltd., and the Tribunal pursuant to Section 22(5) of the said Act directs the Registrar to carry out the Proposal.

BRIDGET I. METCALF

APPEAL FROM A DECISION OF THE
COMPLAINTS COMMITTEE OF THE
FUNERAL DIRECTORS AND ESTABLISHMENTS ACT

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
TIBOR PHILIP GREGOR, Member
LYNNE LEE, Member

APPEARANCES:

BRIDGET I. METCALF	- Applicant
RICHARD P. PEDDER	- representing
	Ward Funeral Home
YVES GAUTHIER,	- party
DONALD POSLUNS	- representing the Board of Funeral Services

DATE OF HEARING: 1 November 1991 Toronto

REASONS FOR DECISION AND ORDER

On June 2, 1989, Mark Kenneth Anthony Duckett ("Mark") was killed in an accident. On December 21, 1989, Helen Keeley, a solicitor sent the following letter to the Board of Funeral Services:

We are the solicitors for the estate of the above named deceased, who died intestate survived by his father, Michael John Anthony Duckett, as his sole heir at law and next of kin.

The father, Michael John Anthony Duckett, has since died on October 12, 1989, survived by his two sisters, Bridget Imogene Metcalf and Jacqueline Anne Caroline Formela, as his sole heirs at law and next of kin.

The funeral arrangements for Mark Kenneth Anthony Duckett were conducted by Ward Funeral Home, Weston Chapel, 2305 Weston Road, Weston, Ontario M9N 1X7, upon the directions of Jacqueline Carter, the sister of the late Peggy Lou Duckett, who was the mother of the deceased Mark Kenneth Anthony Duckett.

We are writing to complain of the treatment accorded Michael John Anthony Duckett at the time of the funeral of his son by Ward Funeral Home. Despite the fact that Ward Funeral Home was well aware that Mark Duckett was survived by his father, and despite requests by the two above mentioned sisters of Michael Duckett to Mr. Yves Gautier, the funeral director, Ward Funeral Home refused to permit the father to be alone with the body of his late son. Mr. Gautier, the funeral director, indicated to the above mentioned sisters of Michael Duckett that upon the specific instructions of Jacqueline Carter (the above mentioned sister of the late Peggy Lou Duckett) the father was not to be permitted to be alone with his son's body. Further, the family of Michael Duckett was asked by a funeral director to move from the front pews to the back pews of the Chapel at the funeral, but refused.

We feel that this is extremely shoddy treatment of the father, and that it was quite improper for Ward Funeral Home to accept funeral directions from the aunt, rather than the father who was the next of kin. Please consider this as our formal complaint against the funeral home.

On January 3, 1990, the Registrar of the Board of Funeral Services replied to Ms. Keeley and stated the procedure which would be followed:

As required by Section 11(1) of the Funeral Services Act, your complaint has been sent to the Ward Funeral Home. After the response is received, any other necessary investigations will be completed and then the matter will be placed before the Complaints Committee of the Board of Funeral Services. A written decision, with reasons, will be sent to you and to the funeral home complained against.

Yves Gauthier, a funeral director and Richard P. Pedder, the General Manager of Ward Funeral Home replied to the complaint

with a detailed six-page letter attached to which was a copy of their worksheet, accounts for Mark and his mother Peggy Lou and copies of four letters from Ms. Keeley as solicitor for the two estates.

The Complaints Committee considered the evidence presented and issued the following decision:

BOARD OF FUNERAL SERVICES

DECISION OF THE COMPLAINTS COMMITTEE

COMPLAINTS COMMITTEE: Barbara Beck DATE: Feb.7, 1990
Jas. Erb
Frank Eagleson

COMPLAINANT: Michael Duckett

RESPONDENT: Ward Funeral Home

COMPLAINT:

The solicitors for the estate of Mark Duckett complained that:

1. Mr. Yves Gauthier accepted direction from Ms. Jacqueline Carter, aunt of the deceased, instead of Mr. Michael Duckett, father of the deceased.
2. Mr. Gauthier refused to permit Michael Duckett to be alone with his son.
3. Seating was not arranged for Michael Duckett for the funeral service and he was asked to move from the front pew to the back of the chapel.

INFORMATION:

Mr. Richard Pedder, General Manager of Ward Funeral Home responded to the complaint on behalf of Mr. Gauthier.

He explained that Mr. Gauthier had taken

direction from Ms. Carter because no one else had come forward and because Mr. Gauthier had been told that:

1. Mark Duckett had lived with his aunt, Jackie Carter, since the death of his mother.
2. When Mark Duckett died in Barrie, the police contacted Ms. Carter who identified the body.
3. Ms. Carter had informed Mark's father of the death and neither he nor anyone else came forward to take control.

Mr. Pedder went on to explain that Mr. Michael Duckett had plenty of opportunity to be alone with his son. The only restriction imposed was that on the first day of visitation, no one was allowed into the visitation room until Ms. Carter arrived on Ms. Carter's explicit instructions.

Mr. Pedder also stated that at most, the family would have been asked to move back one pew to make room for the pallbearers.

In conclusion, Mr. Pedder explains that Ms. Carter had paid for the service and had provided a grave.

A note was also received from Yves Gauthier which confirmed Mr. Pedder's account.

OPINION:

The Complaints Committee is aware of the need for funeral service personnel to ensure, when making funeral arrangements, that they are taking instruction from the person legally entitled to give instruction.

The Complaints Committee is also aware that in the matter of funeral arrangements made at need, some urgency exists.

In their opinion, Mr. Yves Gauthier made a reasonable effort to ascertain whether or not Ms. Carter was legally entitled to make the arrangements and he was not wrong in accepting

her direction based on the information he was given.

However, when Bridget Metcalf and Jacqueline Formela, aunts of the deceased, arrived for visitation and told Mr. Gauthier that Michael Duckett should be in charge of the arrangements, Mr. Gauthier should have arranged to meet with Miss Carter and Michael Duckett in order to establish which person should be giving direction.

Had this occurred, the misunderstanding over cars, seating and visitation would have been avoided.

Mr. Gauthier must be admonished for not take the additional step.

Furthermore, the staff of the Ward Funeral Home should ensure that when the arranging funeral director is not present for the service, the funeral director who does conduct the service is informed of all pertinent information.

DECISION

The matter will not be referred to Discipline.

Barbara Beck, Chairman
For the Complaints Committee

On May 10, 1990, Bridget Imogene Metcalf requested "a review of this decision at the earliest time possible".

With the proclamation of the Funeral Directors and Establishments Act 1989 in June of 1990, the letter from Ms. Metcalf was sent on to this Tribunal. When two Funeral Directors were appointed on July 17, 1991 to the Tribunal to bring their expertise to any appeals, it became possible only then to schedule this and six other appeals from decisions of the Complaints Committee.

The hearing took place on November 1, 1991. While more than three months had passed since the date of decision to the letter of appeal, the Tribunal was not directed to consider the

effect of Section 17(2) of the Funeral Services Act R.S.O. 1980, Chapter 180, which allows an appeal procedure if requested within 20 days of receipt of the written decision.

Bridget Imogene Metcalf ("Metcalf") and her sister Jacqueline Anne Caroline Formela ("Formela") are the administrators of the estates of Mark Kenneth Anthony Duckett, of his late father and their brother Michael John Anthony Duckett ("Michael") and of his late mother Peggy Lou Duckett ("Peggy Lou") who died on August 22, 1987.

Metcalf said that while making funeral arrangements for her late brother Michael, she received information and was closely questioned as to her instructions by the funeral director. This reminded her of her treatment at the time of Mark's death and her complaint is based upon her hurt feelings and her dismay and anger at the actions of Yves Gauthier.

She believes that a greater familiarity with the Statute should be part of the training of funeral directors and that their knowledge of consumer counselling should be improved. She further believes that the Ward Funeral Home had a duty to speak with Michael Duckett as to his wishes for his only son. She said that any references to domestic disputes must have come from Jacqueline Carter ("Carter") who is a sister of the late Peggy Lou Duckett and that any such references are slanderous.

Since Carter was attending to the funeral arrangements, Metcalf proposed to Gauthier that she, her sister Formela and Michael Duckett would arrive early so that Michael would be alone with Mark for awhile and they would not stay on for the evening visitation. On their early arrival, she said that Gauthier repeated instructions that no one was to enter the visitation room until Carter arrived. With the end of the proposed plan, the "Duckett" group remained for the evening.

At the funeral service, the "Duckett" group took the front left pew while the "Carter" group were in the front right pew. When asked to move back to allow the pall bearers to sit in the front left pew, Metcalf refused as the chapel was well filled and only seats at the rear, if any, would be available. She said that her brother Michael had suffered three heart attacks and was not told of these problems so that he had no reason to complain personally.

Metcalf looks for an apology from Gauthier and the Ward Funeral Home, and has come to the Tribunal for an opportunity to have her opinions openly stated in public.

Jacqueline Carter reviewed the events of June 2, 1989. Mark had lived with her since the death of his mother, Peggy Lou. She said that she spoke with Michael and suggested the Ward Funeral Home which had attended to her sister and Mark's mother, Peggy Lou. She said that Michael agreed that Mark should be buried in the same plot as his mother and that she should make any necessary arrangements. She denied giving any instructions that would prevent Michael from being alone with Mark.

Yves Gauthier ("Gauthier") is a funeral director now in Cornwall who had been with the Ward Funeral Home for four years. He was on duty on June 3, 1989 and took instructions from Carter, an aunt with whom Mark lived, and who had the authority to make arrangements in his opinion. While a car had been ordered for the "Duckett" group, Gauthier stated that he met Metcalf and Formela for the first time on the Monday evening and did not follow Metcalf's suggested sequence of visitation as he had no instructions from Carter on that proposal and did not know if Carter was even aware of the suggestion.

He said that he had received a message about Metcalf's call to the funeral home only on Sunday afternoon. There were no instructions given by Michael to stop any arrangements and Gauthier believes he acted properly in the circumstances.

Richard Pedder ("Pedder") is the General Manager for the three branch chapels of the Ward Funeral Home. He knew of the funeral services provided to Peggy Lou Duckett and said that his duty was to be neutral in a time of family stress and that the details of such matters are not his business. In his opinion, the arrangements had been made by Carter who was an authorized and responsible person. He thought that everyone had been well treated at the funeral home including a large number of Mark's deaf young friends and that Michael thanked him after the service. His only reason for mentioning Peggy Lou's funeral was to establish the logical reason as to why Ward Funeral Home was asked to attend to Mark's funeral by Carter.

To him the arrangements were reasonable in that Mark lived with Carter, Michael had agreed for Carter to go ahead and Carter had made the earlier arrangements in 1987 for Peggy Lou Duckett.

Jacqueline Formela ("Formela") stated that Gauthier should not have discussed the problems that existed in the hallway at the funeral home, but should have met with Metcalf and Carter to sort out any concerns and procedures. She said that Michael was not told of the difficulties in order to shield him from further stress. She thought that a guideline for actions by funeral

directors in such difficult family times would be useful.

Counsel for the Funeral Services Board agreed that standards for and education of funeral directors are very important. He said that the principles of professional conduct are clear and should be understood by all. Normally, the funeral director relies on the person who has ostensible authority to act and that happened here. There was no reason to be suspicious of the arrangements, but here the funeral director should have been more cautious when contradictions began to appear. He believed that the decision of the Complaints Committee to admonish Gauthier is correct and sufficient. Since persons do not go into a funeral home and take on financial responsibilities without reason, the chances of an error in these matters is small, he said.

We note that Gauthier has been admonished and that Pedder agrees that the message referral system at the funeral home needs to be improved so that prompt response is made to calls from the public. We encourage the Funeral Service Board to have underlined and repeated in the educational programs the need to avoid misunderstandings and to improve standards of communication. We also recommend that substantial time be allotted in the training course for the review of the new Funeral Directors and Establishments Act 1989 and the accompanying Regulations so that all are familiar with the contents. We finally recommend that a funeral director clearly ascertain who has the legal authority or is charged with the responsibility for the arrangements made in the contract with the funeral home.

The Tribunal has considered the complaints of Metcalf and Formela and pursuant to Section 14(9) of the Funeral Directors and Establishments Act 1989 directs that no further action be taken in this claim.

THE CORPORATION OF THE CITY OF YORK

IN THE MATTER OF
813270 ONTARIO LTD.
(RAINBOW CASTLE RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO ISSUE A DINING LOUNGE LICENCE

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
LUCIENNE BUSHNELL, Member
ROBERT COWAN, Member

APPEARANCES:

STEPHEN LE DREW, representing the City of York

ALLAN J. DAVIS, representing 813270 Ontario Ltd.

RICHARD E. KULIS, representing the
Liquor Licence Board

DATES OF HEARING: 8, 9, 10, 11 July 1991 Toronto

REASONS FOR DECISION AND ORDER

This was a hearing before the Tribunal arising out of the decision of the Liquor Licence Board to grant a dining lounge licence to 813270 Ontario Limited in respect of the premises known as Rainbow Castle Restaurant (hereinafter called "Rainbow Castle"). This licence was issued by a decision and order dated September 14, 1990, and was subject to final inspection and receipt of supporting documentation and was subject to the following terms and conditions:

1. The capacity of the proposed licensed area be limited to 150 persons; and
 2. There shall be signs posted in a prominent area of the establishment to direct patrons as to legal places to park.

The hearing following which this decision was given was held on August 13, 1990 to consider a Proposal issued by the Board

on April 2, 1990 to refuse to issue the licence. At that hearing, four additional parties were added as parties to the proceedings, namely, the Corporation of the City of York and four individual persons who were objecting to the issue of this licence. On September 17, 1990 the City Council of the City of York passed the following Resolution:

Moved by Alderman Ben Nobleman

Seconded by Mayor Fergy Brown:

WHEREAS the liquor Licence at the Latin Palace, located on Peveril Hill Road North, a residential street, was suspended in October 1988 because of many complaints by residents in the area due to illegal parking, rowdy behaviour by patrons at 2:30 a.m. etc.; and

WHEREAS there has been a new liquor licence application on the same site with opposition from the residents;

THEREFORE BE IT RESOLVED that the appropriate City officials be requested to study the feasibility of rezoning the premises, or other means to prevent further liquor outlets and report back to Council in the near future;

AND FURTHER, that if the Liquor Licensing Board of Ontario approves the application of the Rainbow Castle, that City Council appeal the L.L.B.O.'s decision by hiring an outside lawyer, if necessary;

Thereafter, on September 20, 1990, the Corporation, over the signature of the Mayor, wrote a letter to the Registrar of the Tribunal by way of a notice of appeal of the decision upon the following grounds.

1. The Board erred in deciding that there were not sufficient grounds to refuse the issuance of the licence on the basis of public interest.
2. The licence granted is not in accordance with the intended use of the premises. The

applicant intends to use the premises as a nightclub.

At the hearing, the Tribunal was advised that the three individual objectors who had been added as parties to the proceedings before the Liquor Licence Board did not wish to be parties to this appeal before the Tribunal and the hearing proceeded with only three parties before it, namely, the Corporation of the City of York, the Liquor Licence Board of Ontario and the Rainbow Castle Restaurant. All three were represented by counsel and counsel for the City of York represented as well all of the objectors.

At the opening of the hearing, counsel for the Rainbow Castle brought a motion for an order that the Tribunal had no jurisdiction to hear this appeal because of the application of Sections 25(1) and 63(4) of the Liquor Licence Act, S.O. 1990, Chapter 15, which came into force on September 15, 1990. These provisions repeal the provisions for an appeal to the Tribunal provided in Section 14(1) of the Liquor Licence Act of Ontario in force up to that time.

The information given to the Tribunal was that, while the decision from which the appeal was taken was drawn up and signed on September 14, 1990, it was not communicated to the parties until some days after September 15, and these facts were acknowledged by all of the parties. It was the submission of counsel on behalf of Rainbow Castle that the "issue" of the decision within the meaning of Section 63(4) above mentioned, means at the earliest the date upon which it was forwarded in some manner to the parties, and not simply the date upon which it was signed and nothing else done with it.

Counsel, on behalf of the Liquor Licence Board, advised that the Board had drawn up and signed on September 14 its decisions on all reserved matters at that time, (in order to be as fair as it could to all parties thereto in respect of the transitional provisions in the new Act) and it was his submission that "issue" in Section 63(4) meant the date the Board issued the decision by bringing it into existence which was on September 14. We are dealing here with relatively new provisions of the Act and counsel were not able to bring to the attention of the Tribunal any jurisprudence dealing with these sections, and it appeared to the Tribunal that this point was being raised before it for the first time. The Tribunal had, therefore, to determine this question upon the application of general principles relevant to it. These principles appear to be the following:

1. Where a right of appeal is given to a party or to parties to a proceeding pursuant to a statute, and the Legislature enacts a new statute for the purpose of taking away this right of appeal, it will not have the effect of taking away such right from parties to proceedings which are already in existence unless it specifically so states.

2. The date of issue of a document commencing a legal proceeding for which a limitation period is applicable is the date upon which it is made up and signed in the office of issue and not the date upon which it is subsequently delivered to the parties thereto because a limitation requirement is satisfied by the issue of a writ, statement of claim, or other document issued from a court office and the time limited for its service upon the parties is subject to a completely different provision, commencing with and not ending with, the date of issue.

3. It is the function and duty of this Tribunal to protect, as far as is proper, the rights of parties before it. Just as the Tribunal should protect the licence holder's rights in such circumstances from being cut off, so also should it protect the rights of persons objecting to the issue of the licence as in this case.

Applying these principles to this issue to be determined, the Tribunal reached the decision that the Liquor Licence Board was correct in its view of the effect of the issue of this order on September 14, 1991, and that its creation and signing of the order on that date constituted its issue within the meaning of subsection 4 of Section 63 of the Act aforementioned.

The case of the objectors was supported by viva voce evidence of 32 witnesses, by approximately 198 signatures of persons attending the hearing on July 8, 9 and 10 and signing sheets provided for this purpose of indicating their opposition (some of the signatures are those of persons who gave viva voce evidence, and it appears that a few persons may have signed the sheets on more than one day, but the extent of the concern of persons from the community is clearly indicated by these numbers) and by the large number of letters written to the Registrar by people voicing their objections to the issue of this licence and giving their reasons therefor. (Some of these were from persons who gave viva voce evidence or who signed the aforementioned sheets, but these letters also showed the extent and depth of the concerns of the people in this neighbourhood.)

We are concerned here with premises which are in the basement of a commercial building on the southwest corner of Eglinton Avenue and Peveril Hill Road North having a municipal

address of 881 Eglinton Avenue West in Toronto. The area in which the building is situated is zoned commercial and permits the use being sought by the applicant for this licence. There is a commercial building opposite on the southeast corner of the intersection and the commercial zoning extends south from Eglinton Avenue beyond both of these buildings where it changes to a residential zoning for the next adjacent and following buildings which are residential houses on both sides of the street. The line of demarcation between the commercial zoning on the west side of the subject building and the first house in residential zoning next to it is a public lane open for traffic between Peveril Hill Road North and the next street to the west.

The relevant history of the premises in question is that sometime prior to 1970, a company which was operating a restaurant on the ground floor of the building facing Eglinton Avenue decided to construct in the basement of this building, banquet hall facilities which would be rented for private parties. As part of the operation, the present entrance to the basement premises was constructed to come in off Peveril Hill Road North. This owner operated a banquet hall under the name of "The Town House", and it was licensed to serve liquor with its meals throughout its operation which appears to have continued into the early 1980's. During this period it was used for weddings, bar mitzvahs and all types of private parties. All of the evidence indicated that this operation caused no problems in the neighbourhood and did not give rise to complaints or objections.

After The Town House was closed, two Chinese restaurants followed one another in these premises, the first one being the "House of Sechuan" which appears to have operated about three years and "Yu's" which appears to have operated about two and one-half years. While there was some opposition to these premises being licensed, they appear to have created no problems in the neighbourhood and to have attracted few, if any, complaints. They were operated as ordinary restaurants with a liquor licence to sell liquor with the meals served.

The trouble with the premises started when the operator who took over the premises next opened "The Latin Palace" which was in fact a nightclub operation, and which, indeed, created what was described as "a horror story". To quote from Alderman Ben Nobleman's letter which he presented to the Tribunal, as an exhibit:

The residents of Peveril Hill Road North suffered for years with the previous license, the Latin Palace, during the disturbances of inebriated patrons leaving

or loitering outside the premises until 3:00 a.m. Their conduct included:

- 1) screaming and shouting obscenities
- 2) urinating and vomiting on lawns
- 3) fighting, including use of weapons
- 4) openly selling and using drugs
- 5) prostitution
- 6) threatening and harrassing (sic) residents
- 7) property damage to homes and cars

The Latin Palace's licence was suspended for a month in September, 1988 and several months later they transferred their licence to a Toronto location.

The Tribunal was told that the owner of the Latin Palace was himself involved in the drug trade and is presently serving a prison sentence of over ten years for a conviction for trafficking in cocaine. We shall refer in more detail to the evidence of witnesses on these matters later, but suffice it to say as part of the relevant history of the premises, that Mr. Nobleman's evidence was corroborated by many other sources and appears to give an accurate picture of the situation. The Latin Palace closed in September, 1988 and the premises have not been opened since that time.

The sole issue to be determined by the Tribunal at this hearing is whether the City of York and the other objectors have established that the issue of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises are located, pursuant to Section 6(1)(g) of the Liquor Licence Act. Pursuant to Section 6(1), an applicant for a licence is entitled to the same unless the objectors can show him to come within one of the clauses set out thereunder and the onus is on the objectors to do so. In this case, all of the parties agreed that clause (g) is the only one of concern for this purpose here. The Tribunal appreciates that the determination of this issue is of unusually great concern to an unusually large number of people and we shall, therefore, next review the evidence in some detail.

It is to be noted first that almost all of the political leaders in the community came forward to support and assist the objectors to this licence and, indeed, the Corporation of the City

of York itself, in which the premises are located, was the principal party opposing the issue of the licence both before the Liquor Licence Board and before this Tribunal. Mayor Fergy Brown of York began by imploring the Tribunal to revoke this licence and he spoke of agonizing, frustration and hurting crying out from all of these objectors about this particularly incompatible and inappropriate location for this establishment.

The next such witness was Councillor Cole, the councillor representing the area York-Eglinton on the Metropolitan Toronto Council. He stated the operation of The Latin Palace was one of the most notorious around which put the area into "a state of siege". He believed that the issue of this licence would lead to a reoccurrence of the evils of The Latin Palace and, in addition to what others said, referred to the extra problems and strains that this would place upon an already overtaxed police force. He said that it had been a mistake to allow this place to be licensed in the first place, and this mistake should not be perpetuated.

Elizabeth Hill, a school trustee on the Board of Education for the City of York, attended representing the Chairman thereof and presented a letter from the Chairman, and gave her own evidence as well. Through these persons, the Board of Education told of its concerns and efforts and its commitment in time and money to combat drug and alcohol abuse among its students, and they deplored the issue of this licence which they saw as encouraging these evils.

Tony Rizzo, the member of the Ontario Legislature for the constituency including this location, gave evidence to support the concerns of the objectors. However, he also said that if appropriate changes could be made to prevent the abuses created by The Latin Palace, he would give serious reconsideration to the matter. In discussing such changes, the important thing would be the elimination of any type of nightclub and to do this, one change would have to be the elimination of the dance floor and of music for dancing.

I have already referred to the evidence of Alderman Nobleman. He has been an Alderman for 25 years for the Ward, including this area, and indeed he had a business office for many years on the second floor of this same building at 881-883 Eglinton Avenue West. In addition to what has already been quoted from his letter above, he described the Cedarvale area as being a fine residential area which lately has seen an influx of families with small children, the immediate vicinity of these premises as having a serious shortage of parking, and the whole surrounding

neighbourhood as being one in which anything like The Latin Palace operation is completely out of place.

The final witness in this category was Councillor Gardner from Ward 15 of the City of Toronto, which includes the area north of Eglinton Avenue from Yonge Street over to west of the Allen Road, and is therefore directly affected by this application. She spoke of this area being a fine residential neighbourhood and of the fact that so many such areas in Toronto are under constant attack from commercial intrusion and as she referred particularly to the long-standing fight to prevent the spread of the "Yonge-Eglinton bar scene" along the Eglinton Avenue shopping strip and said that a nightclub such as The Latin Palace was not wanted in this location.

We come next to the evidence of the witnesses who reside in the vicinity of the proposed licensed premises and whose evidence, as indicated in a good deal of jurisprudence, should receive more attention and weight for that reason. There were approximately 22 such witnesses called including the owner of the house next to the premises on the west side of Peveril Hill Road North, approximately seven other such witnesses who lived further down the same street and the others who lived on other streets in the community known as Cedarvale, the last being Mr. Philip White, who was the Mayor of the City of York from 1970 - 1978 and he came before the Tribunal as a concerned resident from that community.

These witnesses established clearly a list of concerns - concern for the safety of residents and particularly children and older people, the fact that parking in the area is terrible, the fact that people, including children coming home from the bus stops at Eglinton Avenue and Bathurst Street have to pass this place, the fact that there are many schools in the area including schools open for night classes, the fact that owners had paid a premium to come and live in this community for its safety and security for themselves and their families which were threatened by this proposal, and particularly strongly felt were the concerns for the return of an operation similar to The Latin Palace. These witnesses described the commotion and disturbance in the community when substantial numbers of patrons of The Latin Palace emerged from its premises after closing hours. This included the noise of loud voices, singing, shouting, swearing, fights breaking out, damage to property including trampling of lawns and flowers, the breaking of windows of both cars and houses, and other damage to both, of certain patrons vomiting and urinating, and also of drug trafficking among the patrons, one of the traffickers being the owner himself as aforementioned. It was clear from this evidence that the "horror scene" described was confined to the period of operation of The Latin Palace, and that the operation of the

townhouse and of the two Chinese restaurants did not give rise to the abuses and complaints described.

In this context, Mr. Philip White was able to give to the Tribunal more details of the history of the operation prior to The Latin Palace than was given by most of the other witnesses. He described how the community had changed over the years, how the parking problems increased as the area was built up, and how the problems changed and increased from the point of view of the police. He said in retrospect that he considered the City of York had made a mistake in allowing these premises to be licensed in the first place with this entrance on the residential street, Peveril Hill Road North. Like the other witnesses, he told the Tribunal that the abuses described which could not be allowed to be repeated had arisen from the operation of The Latin Palace and said that if the Tribunal could not now see its way to preventing the continuation of any licence on these premises, at least a new one should have four conditions which would prevent the unacceptable abuses of The Latin Palace being; the removal of the dance floor, the removal of the raised platform so there would be no place for the presentation of live music, the reduction in the size of the bar, and the establishment of closing hours of 10:00 p.m., except on Friday and Saturday nights which could be extended not past 11:00 p.m.

The hearing of the foregoing evidence could leave no doubt as to the depth, intensity and sincerity of the concerns of the local residents in objecting to the issue of this licence. All of this was corroborated and supported by the large number of persons who attended the hearing to show their opposition, who signed the sheets indicating that opposition and who wrote the letters to the Registrar as mentioned above.

The rest of the evidence presented on behalf of the objectors was the evidence of certain municipal officials and other restaurateurs called to give evidence as to details of the proposed operation and certain opinions about it and this evidence included copies of the plans filed with the Building Department of the City of York by the applicant for the licence. This evidence established certain facts which are relevant to the issues to be determined - the relatively large size of the premises which constitutes the whole of the basement of this building, the fact that the entrance to be used by patrons is on Peveril Hill Road North closer to the southern limit of the commercially-zoned area than to Eglinton Avenue, the fact that the entrance off Eglinton Avenue into the building is not suitable for other than an emergency exit for these premises, the fact that the premises have no outside windows and the fact that the submitted plan shows a

40' bar, a raised area by way of a bandstand and a relatively large sunken area with hardwood floor for dancing.

We turn now to consideration of the evidence presented on behalf of the applicant for the licence, Rainbow Castle Restaurant. Its principal witness was Mr. Ewart Dehaney, who is the principal in the company and proposes to be the operator of the restaurant. He is forty years of age, was born in Jamaica and came to Canada about 28 years ago having been a high school teacher in Kingston, Jamaica. He is self-employed, having apparently done quite well operating a retail and wholesale business selling musical recordings of different types and he also writes and publishes music himself. His sales are made in the United States, Britain, other European countries and in Japan, as well as in Canada, and his place of business is The Record Factory on Eglinton Avenue, between Marlee and Oakwood Avenue, in the heart of a substantial West Indian area of the city. He has extensive knowledge of the West Indian community where his business is situated and of other West Indian communities in the greater Toronto area.

On the critical issue of what he proposes to do with these premises if he obtains his licence, he told the Tribunal that it is his proposal to operate a high-class fine dining restaurant and to have no part of anything resembling a nightclub. He said it was his conclusion that there is a need and a place in the community for a high-quality West Indian restaurant and that the subject premises are an excellent location for it where, if properly run, he expected he could be successful. He said that there were some places on Eglinton Avenue in the West Indian area where one can get West Indian food, but these are small and mostly provide take-out food and are not the type of establishment which he contemplates at all.

Mr. Dehaney told the Tribunal that he has learned of the operations of The Latin Palace and of the problems which it caused and said that what he proposes is completely different. In order to help allay the fears of the local residents, he made certain commitments and agreed to others to ensure that The Rainbow Castle would not be a nightclub or recreate the problems of The Latin Palace. He has already had the dance floor removed by putting in a new floor at the surrounding floor level, thus removing the sunken dance floor, and he said that he would have no stand-up area for drinking and would change the location and reduce the size of the bar. He also said that he would have no live music on the premises except for a piano and he agreed to suggestions as to closing hours and as to clearing the premises after the same, and also to certain training for management and staff to help ensure proper management of the operation.

On cross-examination, he said he believed he had a 50 - 50 chance of success, and that he would be emphasizing food and particularly West Indian food in his restaurant but that he would need his liquor licence for the operation to be successful. He said that he would not tolerate any undesirable elements on the premises and that most such, if they come to a classy place and see they do not belong, will not stay or come back and that he would see that proper care is taken of any such persons who do try to cause any trouble. He said that he would hire a competent manager and expected to spend 80% of his working time there until the restaurant has got properly under way.

Finally, Mr. Dehaney said that he expected to attract people who wished to eat West Indian food, being West Indian-Canadians, from the nearby and other West Indian communities around Toronto, and being other Canadians who by reason of having been to the West Indies or for other reasons wish to get such food because there is no place in this whole area presently where they can do so.

Other witnesses supporting the application for this licence were: Dr. Causley Dehaney, brother of Ewart Dehaney, a microbiologist, with a Ph.D. from the University of Toronto, who will have a financial interest in the restaurant and who said that he had no doubt of his brother's ability to operate this business. He also said that this would be a restaurant as described by his brother with no dancing or other features of a nightclub and that, from his knowledge of the West Indian community in the greater Toronto area, he believed there was a good place for such a restaurant here; Phyllis James, who came from Jamaica originally but has been in Toronto for a good many years and is now the hotel manager of a Heritage Inn, said that she had worked for Mr. Ewart Dehaney while going to college here, she spoke highly of his business ability and she also said that she was familiar with certain establishments in the Toronto area where West Indian food can be had and that there is nothing comparable with what Mr. Dehaney is planning, that he has a good marketing strategy, and that he should be successful, and lastly, that the proposed Rainbow Castle Restaurant should be in no respects a nightclub; finally four other witnesses, three of Jamaican origin, gave evidence to the effect that there is no fine restaurant in the Toronto area serving West Indian food, and that they would wish to patronize one and they believed that there are many others in the area who will do so as well.

In the argument following the presentation of the evidence, counsel for all parties agreed that the decision in this case should turn upon the proper application of Section 6(1)(g) of

the Liquor Licence Act, the relevant parts of which read as follows:

Section 6(1)

An applicant for a licence, ... is entitled to be issued the licence...except where:
... (g) ..., the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located.

It is not within the jurisdiction of the Tribunal, and therefore not its function, to deal with the many problems mentioned concerning parking, noise, the proximity of schools, or the fact of the entrance to these premises being on Peveril Hill Road North, except as these may form some weight in the side of the scales against the public interest. It is not strictly accurate to say that the entrance to this establishment is on a residential street because it opens upon a part of Peveril Hill Road North (albeit quite a short part) which is zoned commercial.

There are many streets in Toronto which are bounded by different zonings, each with a marked line of demarcation between them, and in this case the line of demarcation between the commercial and the residential zoning is the lane south of the building in question. This zoning, as well as the enactment and enforcement of parking and noise and all other land use regulations are, as stated by the Liquor Licence Board in its decision, within the role of the City Council to determine and not of the Board or of this Tribunal.

The evidence of the witnesses voicing their objection, the large number of persons who attended the hearing and signified their objection by signing the sheets, and the large number of letters sent by residents of the area established beyond doubt the depth, extent, and sincerity of those persons opposed to this licence. The question which this Tribunal must determine is whether that opposition is sufficiently justified to discharge the onus upon the objectors under Section 6(1) and thereupon to override the decision reached herein by the Liquor Licence Board.

There is no doubt that the operation of The Latin Palace provided many of the bases for the concern in the community. There was a real division among the objectors who gave evidence between those who were simply opposed to the opening of any licensed operation on these premises and those who were seeking to prevent another nightclub and activities and conduct which they associated

with The Latin Palace. In determining this question, the Tribunal has reached the conclusion that the fears and concerns of those who are opposed to any licensed operation in these premises, although completely genuine and sincere, are not sufficiently justified upon the evidence to constitute a discharge of the onus placed upon the objectors by Section 6(1) of the Liquor Licence Act.

The operation of a high-class restaurant featuring West Indian food at this location with none of the attributes of a nightclub should not re-create the abuses described. The evidence presented on behalf of the applicant for the licence to this effect was corroborated by the fact that these abuses did not flow from the operation of the licensed premises prior to The Latin Palace on this location and do not flow from the operation of other licensed restaurants in the area.

The final question to be determined is whether, upon all of the evidence, the Tribunal should find that the probability is that Mr. Dehaney will operate the very type of establishment which he describes or whether, for various reasons, it will deteriorate into a nightclub with an operation and patrons which are clearly unacceptable at this location. To deal with this question, the Tribunal must consider particularly the evidence of Mr. Ewart Dehaney. In its reasons for its decision, the Liquor Licence Board stated that it was impressed with his testimony and that of others attesting to his character, and this Tribunal can state that it was also so impressed. Mr. Dehaney stated clearly and unequivocally that he has no intention, whatever, of operating a nightclub or of allowing the reoccurrence of the abuses of The Latin Palace, and he suggested certain conditions and accepted others designed to ensure that this would happen and reassure the local residents on this point. He outlined just as clearly the type of restaurant he intends to operate. To find or to conclude that his stated intentions to the Tribunal are not his real intentions, the Tribunal would have to disbelieve his evidence and we do not have, in the circumstances here, any basis for doing that.

Accordingly, the Tribunal cannot reverse the decision of the Liquor Licence Board to issue the licence requested but it can protect and reassure the residents of the area by attaching certain conditions thereto in addition to those imposed by the Board. As will be seen, these will all be conditions discussed during the course of the presentation of the evidence and of the argument and are, indeed, all of the conditions discussed which the Tribunal considers it practical to impose. These will be that the premises will contain no dance floor and no dancing will be allowed, there will be no live music allowed except for a piano, no stand-up area for drinking will be allowed and the bar will be changed so that it will not have more than eight stools and the hours for the

service of alcohol will be 11:00 a.m. to 11:00 p.m. from Monday to Thursday nights, 11:00 a.m. to 12:00 midnight on Friday and Saturday nights, and 12:00 noon to 11:00 p.m. on Sunday nights, that the licensed premises will be cleared of patrons one hour after the above-noted closing hours for services of liquor and that all management personnel and staff, who will be working in the premises, if not otherwise required by the Liquor Licence Board, will be required by this order to attend what is known as the SIP program and certain programs provided by the Board for the education of management personnel for licensed establishments.

In the course of the argument, the Tribunal was referred to a number of authorities and considered some of these, particularly in coming to a decision. The first of these was the Elm Flameburger case, (1987) CRAT, vol. 16, p.103 at p.106:

In reaching its decision, the Tribunal has been guided by the following principles which have been enunciated from time to time in its previous decisions:

- the public must be aware that under Liquor Licence Act, a person is entitled to a licence unless he becomes disentitled under any of the clauses (a) to (g) inclusive of Section 6(1) of the Act;
- since a person is entitled to a licence, the onus is on the objector to prove, on the balance of probability that, in this case, it is not in the public interest to issue it;
- the public interest must be determined light of two aspects
 - (a) needs and (b) wishes;
- the issues of needs and wishes will not be decided solely on the basis of a head count;
- the concerns of the objectors must be bona fide; and

- the needs and wishes of the immediate residents will be given more weight than those of the transient trade."

The next case is that of Berringer's Tavern Restaurant (1989) CRAT, Vol. 18, p.48 at p.52

... Many of the witnesses for the objectors testified that they had not been inside the restaurant, would not go inside and did not want any commercial operation located on that site at all. It is clear to the Tribunal that their experiences previously with the Coronation Tavern may have coloured their views. But in the view of this Tribunal, the wishes of the community as reflected by the contradictory petitions are not so sufficiently clear as to satisfy the onus of the objectors to this licence application.

and also at the top of p.53:

...In the Elm Flameburger case, the restaurant was located between two private residences. In this case, Berringer's is at the corner of Curry Avenue. In the Elm Flameburger case, many problems of drunkenness, vandalism, rowdiness, noise and parking were cited, which the Tribunal noted were not caused by Elm Flameburger and which would not diminish if Elm Flameburger were not licensed. In this case, although such problems may have existed with the previous Coronation Tavern, there is no evidence before this Tribunal that such problems exist today or that they would arise by the granting of a Dining Lounge Licence to Berringer's.

Next is the Pepper's Restaurant case, (1990) CRAT Vol. 20, p.13 at p.16:

...Matters of parking, noise, rowdiness are all important matters even though they are regulated elsewhere within the

municipality; they are important matters to be dealt with in considering the public interest.

And finally The Boardwalk Bistro case (1990) CRAT Vol.20, p.19. In this case, the Tribunal was dealing with the concerns of objecting residents from the area where the applicant was seeking a licence for a restaurant in a public park controlled by the City of Toronto. The concerns of the residents there were similar to those in this case that the operation would degenerate into a nightclub and that the intolerable consequences of this would be visited upon their park and upon their community. In that case, the Tribunal reached the same conclusion as we have done in this one, namely that, provided the operator kept to the plans for his restaurant which he had put forward, his licence should not be refused but that the objectors should be protected by the imposition of conditions to ensure that this happened and imposed the following five conditions.

1. There shall be no stand-up area in the Boardwalk Bistro.
2. There shall be no dance floor in the establishment.
3. There shall be no nude or exotic entertainment.
4. There may be light entertainment.
5. There shall be a maximum of eight stools at the bar."

Accordingly, by virtue of the authority vested in it, under Section 14(3) of the Liquor Licence Act, the Tribunal directs the Liquor Licence Board to issue the liquor licence which it granted to 813270 Ontario Limited in respect of the premises known as Rainbow Castle Restaurant, situate at 881 Eglinton Avenue West in the City of York, and subject to the same conditions imposed by it:

1. The capacity of the proposed licensed area be limited to 150 persons, and

2. There shall be signs posted in a prominent area of the establishment to direct patrons as to legal places to park,

and subject to the following further terms and conditions

3. The premises will contain no dance floor and no dancing will be allowed.
4. No live music will be allowed except for a piano.
5. There will be no stand-up area for drinking allowed.
6. The bar will be reduced in size so that it may have a maximum of eight stools. It may also be moved to a different location. A proviso will be attached to this condition to the effect that, if the City of York which is a party to this proceeding refuses permission to make the necessary changes in the plans submitted (which the Tribunal thinks highly unlikely) then this condition will not be operative.
7. The hours for the service of alcohol in the premises will be

Mondays through Thursdays	11:00 a.m. - 11:00 p.m.
Fridays and Saturdays	11:00 a.m. - 12:00 midnight
Sundays	12:00 noon - 11:00 p.m.

and that the licensed premises be cleared of patrons one hour after the above-noted closing hours for service of liquor.

8. That the management personnel and the staff who will be working in these premises be required by this condition, if not otherwise required, by the Liquor Licence Board, to attend the Board's program provided for management personnel of licensed premises and the program known as the SIP program, respectively.

878265 ONTARIO LIMITED
(MAGGIE MAY'S DINER)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LIQUOR LICENCE

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
ROBERT COWAN, Member

APPEARANCES:

JOHN McGURK, representing the Applicant

RICHARD E. KULIS, representing the
Liquor Licence Board

DATES OF

HEARING: 10 May 1991

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal decided this matter should be dealt with today rather than delaying and reserving its decision because the matter has been in issue since May 12, 1990, and it seems appropriate both from the point of view of the Licensee and the Liquor Licence Board that the matter be promptly dealt with at this time.

The Tribunal has listened with considerable interest to the arguments put before it by Mr. McGurk and the arguments put forward by counsel for the Liquor Licence Board. One of the things that the Tribunal has to be concerned with is the fact that the laws enacted by the Province of Ontario must be complied with. If one does not agree with the laws, there are appropriate avenues to be taken to see to their change. But once the laws are enacted, everyone must comply with them and this is particularly so of owners and managers of licensed premises. There is no basis in law for accepting ignorance of the law as an excuse.

In the particular facts in this case, Mr. McGurk on behalf of the company, the Licensee 878265 Ontario Limited has acknowledged contraventions with respect to the selling of liquor outside permitted hours. He has not acknowledged the matter of overcrowding and the Tribunal does not find it necessary to deal with that particular issue. The issue that has to be considered

is simply that which deals with serving outside of the hours which are imposed by the Province of Ontario.

The Applicant has requested leniency by virtue of his inexperience, but in fact no substantial evidence has been put forward before this Tribunal to justify our overturning the decision of the Liquor Licence Board after due hearings.

The Tribunal in the past and the Supreme Court of Ontario has stated that it is not the duty; in fact, it is forbidden to the Tribunal lightly to overturn the decisions of a Registrar or a regulatory body. In this regard, I refer to the decision of the Supreme Court of Ontario's Divisional Court in the case of Re: Brenner reported at page 58 of Volume 19 of the Commercial Registration Appeal Reports. And in particular, at page 60 of that decision which dealt with the decision of the Tribunal in regard to issuing a motor vehicle dealer's licence. At page 60, the Divisional Court stated the Tribunal "appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself".

The Court went on to say that this was an error on the part of the Tribunal. The Tribunal must look at the decision which had previously been made and determine whether it honestly had been given based upon the evidence.

This Tribunal sitting today has to look at the decision of the Liquor Licence Board and has come to the conclusion that the Board gave full consideration to the matters before it at the time. The decision which was being considered by the Board was one to revoke a licence and to prohibit a transfer of a licence to the very people who were in charge of the corporation which was managing the premises on the day in which the infraction occurred. The Board, in its wisdom, permitted a transfer of that licence notwithstanding that it could easily have at that time revoked the licence and ordered only a twenty-one day suspension.

This Tribunal does not see how it can in the face of the evidence presented to it today overturn that decision of the Liquor Licence Board. The Tribunal recognizes that the Board has a function, not only to deal with infractions, but to deal with matters of substance and form in the Province of Ontario and that it has an obligation to set examples and to make sure that the law is enforced and complied with by licensees. In passing on this matter, however, the Tribunal is also concerned about the evidence given to the Tribunal in the form of argument by Mr. McGurk of his lack of knowledge, of his background inexperience, of the fact that

he has a new partner coming into the business, of the lack of direct communication with the Liquor Licence Board in regard to that new partner.

The Tribunal is of the view that there should be some additional considerations given, particularly with respect to the fact that there is in the Province of Ontario, a Servers' Intervention Program course which is offered by the Addiction Research Foundation. It is of the view that this Licensee should be required to take that course so that the operators of these premises will be fully conversant with the obligations under the law, both in respect to operation and reporting.

The Tribunal is sympathetic to the position put forward by Mr. McGurk. The Tribunal acknowledges his intention to observe the law completely, but it is of the view that it must uphold the decision of the Liquor Licence Board in this regard today.

Therefore, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the decision of the Liquor Licence Board dated the 14 day of September 1990 and orders that the licence be suspended for a period of twenty-one (21) days and directs the Board to set the date of commencement of the suspension. In addition, pursuant to Section 14(4) of the Liquor Licence Act, the Tribunal imposes the following terms and conditions upon the Licensee; namely, that all owners of the Corporation shares, including John McGurk and his proposed partner, Mr. Clark complete the Server Intervention Program course offered by the Addiction Research Foundation prior to the expiry of the suspension or such extended time as may be permitted by the Liquor Licence Board of Ontario.

873044 ONTARIO INC.
(LAKEVIEW MANOR HOTEL)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO ISSUE A LICENCE

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
ROBERT COWAN, Member

APPEARANCES:

JOHN SCHEULDERMAN, representing the
Corporate Licensee

JOEL S. KUCHAR, representing the
Mortgagee-In-Possession

RICHARD E. KULIS, representing the Liquor Licence Board

NORMAN C. JACKSON, representing the City of Kingston
and ratepayers named as parties

A.K. CASSELMAN, a Party

S. MacKAY, a Party

J.J. WILLIAMS, a Party

DATES OF 22 April 1991 Kingston
HEARING: 5 July 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Decision of the Liquor Licence Board of Ontario issued on August 27, 1990, refusing the application of 873044 Ontario Inc. operating as or intending to operate as Lakeview Manor Hotel at 28 Yonge Street in Kingston, Ontario. The parties to the appeal are the Liquor Licence Board represented by Richard Kulis as counsel, the corporate Applicant represented by John Scheulderman as counsel, Counsel Trust Company mortgagee-in-possession represented by Joel S. Kuchar as counsel, Shane MacKay, Albert J. Casselman, and J.J. Williams, residents from the area who were objecting to the issue of the licence and who were made parties to the proceeding by the Liquor Licence Board at its hearing pursuant to Section 12(3) of the Liquor Licence Act.

The Corporation of the City of Kingston was added by the Tribunal at the opening of this hearing as an objector upon the

request of the City. It is represented as counsel by Mr. Jackson, the city solicitor and, with the agreement of all parties, Mr. Jackson called the witnesses objecting to the issue of the licence and conducted on behalf of all the objectors the examination and cross-examination of witnesses at the hearing.

As set out in the decision of the Liquor Licence Board, Lakeview Manor was licensed as a hotel officially since 1926, but appears to have been in operation as a tavern since approximately 1840. It is situated in what was for many years the "Village of Portsmouth" which is now incorporated within the City of Kingston.

Partly by the nature of its physical layout, it is still considered by its residents as a separate community. The part of Portsmouth Village with which we are particularly concerned here is zoned residential and is principally a residential area entered by two streets, Mowat Avenue and Yonge Street which run south from King Street and which are intersected by three short streets running parallel to King Street and joining these two. Mowat Avenue and King Street run almost together as they come down to the Portsmouth harbour on Lake Ontario. Both sides of Mowat Avenue and the west side of Yonge Street and both sides of the three intersecting streets are built up with individual houses. These streets and lots were laid out in the nineteenth century and the houses were built years ago, and the streets are narrow and the houses close together and close to the street lines. The Lakeview Manor is a large building south of the most southerly cross street and it has been enlarged from time to time over the years. More recently residential accommodation by way of a relatively large condominium apartment building has been constructed just south of the Manor.

On the east side of Yonge Street, south of King Street, is the Portsmouth Olympic harbour constructed for the 1976 Olympic events and maintained since that time by the City of Kingston as a harbour and marina facility.

In addition to this area with which we are particularly concerned at this hearing, Portsmouth Village includes an area to the east on the lake front upon which is situate the Portsmouth or Kingston Penitentiary buildings, an area to the west on the lake front upon which is situate the Kingston Psychiatric Hospital and certain other medical facilities, the commercial area to the north along King Street, and a certain residential area to the north again of King Street and which also contains the west campus of Queen's University. The only entrance and exit for either vehicular or pedestrian traffic to the Lakeview Manor is south from King Street down either Mowat Avenue or Yonge Street and perhaps crossing one of the short cross streets.

In the 1970's, the place was owned and operated by one Steve Amy. His operation does not appear to have caused any trouble or complaints in the community. Approximately the end of the 1970's, it was taken over by a Mr. Grieve. He caused the building to be painted in what certain witnesses called psychedelic colours which is confirmed by photographs which were placed in evidence. This had the effect of making it an eyesore in the area. He also introduced exotic dancers in the afternoons and rock band music in the evenings which by themselves and by reason of the patrons which they attracted, were the subject of objection in the neighbourhood. The evidence differed as to the extent of the abuses and complaints of residents during his time some of the evidence indicating that so long as Mr. Grieve was operating the Manor, it was acceptable in the community and some indicating that it was not.

In any event in the late 1980's, it was taken over by Mr. Crawford and there is no doubt that the operation then deteriorated rapidly and became completely unacceptable. It also became unprofitable and in 1989, the mortgagee, Counsel Trust, evicted Mr. Crawford and took possession. It operated the Manor under a temporary licence until February 2, 1990, when the premises were closed. As indicated, the building is rather a large one containing many rooms which were licensed and, in fact, had a dining lounge licence covering four separate areas with a total capacity of 233, a lounge licence covering three separate areas with a total capacity of 336 and a patio licence with a capacity of 141 for a total licensed capacity of 710 persons.

Since February of 1990, the mortgagee has been trying to sell the property and has obtained an offer from the Applicant conditional upon the issue of the licence which it is seeking here.

Before reviewing the evidence, the Tribunal will deal with some legal issues raised and set out its conclusions so that its review of the evidence will be made with these in mind. It is the conclusion of the Tribunal that the only issue upon which the decision will turn is whether the objectors to the issue of the licence being sought here have established on a balance of probabilities that it is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises are located pursuant to Section 6(1)(g) of the Liquor Licence Act.

The Applicant for the licence and the mortgagee sought support for their case in the fact that the place was operated for many years prior to 1989 with licences the same as or the equivalent of the licences now being sought. Of course, if a

purchaser could have been found and the transfer made while the last licence was still in existence, the whole procedure would have been different and hearings such as this one before the Liquor Licence Board and this Tribunal would not have been required. However, it is the view of the Tribunal that once there is no licence in existence and an application must be made for a new one, the provisions of Section 6 of the Liquor Licence Act apply equally to all such applications.

On the other hand, some of the evidence raised the question of whether the operation of the Manor being proposed in what is now zoned a residential area is prohibited or whether it is a legal non-conforming use? This issue is mentioned in the reasons for decision of the Liquor Licence Board . However, neither the Board nor the objectors relied upon this basis of preventing the reopening of the Manor and it is the view of the Tribunal that it is not an issue within our jurisdiction and, therefore, the sole issue upon which the decision should turn is the one identified above. All of the evidence given at the hearing is therefore only relevant if it is relevant to this issue.

The first witness on behalf of the objectors was Mr. Shane MacKay who lives at 128 Yonge Street and is the President of the Portsmouth Villagers Association comprising some 120 residents of the immediate area. He said that this issue of the reopening of the Manor is one of the more significant ones which they have had. He described a close knit community of families where people walk a good deal on the streets. In the later years of the operation of the Manor, they had to put up with dangerous and impaired driving, squealing of tires, illegal parking blocking their streets, damage to porches and otherwise to their property and to hydro poles and hydrants and the breaking in to houses and boats in the area. He said that there were no conditions upon which he could see this place reopened.

On cross-examination, he said that a year ago before the Liquor Licence Board he was not opposed to a licence if the place was properly run but that he has since changed his mind. He said that Portsmouth has outgrown this type of establishment. Also the Manor itself changed over the years in that earlier it drew most its patrons from the immediate vicinity, but later a different type of people from a much wider area.

Next Mr. James Warren of 17 Richard Street described the building as crowded and maze-like with several openings into the parking lot all around it and openings for traffic off of parking lots on all sides so that it was almost impossible to control traffic.

Mr. Albert Casselman, the President of the Bayshore Condominium Association being the apartment building aforementioned, complained of noise from loud music from patrons leaving after hours from the motors and tires of vehicles and he said they have had peace and serenity all the way since the place has been closed. He said on cross-examination that if the building were cleaned up, the clientele changed and the management improved it would be better but he did not think these things would happen.

Mr. Clarence Dumaresque in Condominium 702 at 2 Mowat Avenue lives in this apartment building with 73 units right across the street. He described loud music up to 2:00 a.m., the roaring of engines, screeching of tires and "blasting off". Before closing, the residents were subjected to hard rock music blasting out of the door facing the building and which could be heard for a mile away at least. After the closing up to 3:00 a.m. in the morning, there was a great deal of noise from the loading of the band's equipment onto a truck. He said that almost every night, there would be noise which could "awaken the dead". He also described how patrons of the Manor would fill up the apartment visitor's parking lot and if anyone objected, he or she would be told in abusive four letter words to keep out of this. Also he told of the underground garage being broken into, cars being broken into and at least one stolen. The Tribunal found Mr. Dumaresque an impressive witness.

Mr. William McCabe who lives at 54 Mowat Avenue told of three porches near his place on the street which were damaged by cars leaving these premises, a brick wall damaged and a car damaged. He also told of a certain utility pole near his house having to be replaced five times and of at least eleven traffic accidents at night on the street close to his home. He also described bad conduct on the part of people leaving the Manor - loud profane shouting and disputes, brawling and urinating and defecating outside. If anyone objected to these people and their conduct, they would be told off in obscene four letter words. He also repeated the complaints of other witnesses regarding traffic and noise problems. He made it clear that these complaints became substantially worse in the last period of operation under Mr. Crawford.

Mr. Peters, who operated Peters Pharmacy at the corner of King and Yonge Streets (opened by his father 62 years ago and run by him now for 30 years), told of problems in the later years of the operation of the Manor - terror in the neighbourhood at closing time, dangerous vehicular traffic, illegal parking, patrons on foot pounding on doors, throwing bottles and cans about and

being responsible for many break-ins and attempted break-ins. All of this stopped with the closing of the Manor.

Theresa Yntera who lives at 87 Mowat Avenue said her principal concerns were traffic loads when children were on their way to and from school and with noise late in the night, shouting, fighting and the evidence of violence in the streets.

Mr. Robert Wilson runs a hardware store at the corner of Mowat Avenue and King Street. He bought this store in August of 1987 and had several break-ins. On two occasions, he lost over \$7,000. He believed that these were caused by patrons of the Manor. He said they could never put out garbage as it would be strewn all over the place and he compared these patrons of the Manor who had no respect for the neighbourhood with a large number of patrons who were brought into the neighbourhood by the Olympic Harbour who do respect it and behave themselves.

James B. Cannon who lives at 21 Kennedy Street with a frontal view of the intersection of King and Yonge Streets told of the traffic congestion and dangerous driving and also concern with the large number of pedestrians misbehaving themselves on the way home from the Manor.

Mary Kennedy of 60 Yonge Street, one hundred yards from the Manor, has lived in Portsmouth Village and all her life and said there were always problems with the Manor, but these became much worse in the last years. She described seeing a taxi driver robbed in the parking lot and told of rude yelling and screaming every night.

On cross-examination, she said she told the Liquor Licence Board that she was not opposed to any licensed establishment, but now, upon thinking about the matter she did not want this establishment open again at all.

Vera McCubbin who lives at Unit 602, 2 Mowat Avenue facing the Manor said it became a nightmare living next to this place. She was there since 1982 and at first it was not so bad, but got much worse as time went on. She told of a great deal of noise late at night when the band equipment was being loaded on to trucks and all the bottles being thrown out into a dumpster. She saw one very serious fight and called police, and saw someone shoved into a car trunk and driven off. She saw many drunks and on occasions when she had to be out, some of these people were very unpleasant to her and she told the Tribunal that what was going on was not suitable for such a residential neighbourhood.

Elizabeth Schell of 204 Mowat Avenue told of the danger of traffic from the Manor during the day and particularly for children, it was like running a gauntlet much of the time. She described once having to dodge with her baby carriage behind a tree to escape a driver. She also said there always seemed to be a large quantity of broken glass about and too often undesirable people.

In addition to the foregoing direct viva voce evidence of local residents, the Tribunal was presented with a resolution of the City Council of the City of Kingston requesting that it deny this licence, the evidence of an officer of the City Police Force speaking on its behalf and of a Chief Building Officer and an officer from the City's Planning Department also opposing the licence.

Constable Harpell, the police officer, said he came into contact with the Manor many times as a result of brawls outside the building and impaired driving and traffic and parking problems. The problems were caused by patrons. He said that the presence of the exotic dancers would always attract certain types of people quite undesirable for a residential area. Also the sheer size of the place was a principal contributing factor to the problems which it caused.

Other witnesses from the City described the area in some detail, an historical area established in the late eighteenth century, an area of stability with old houses close together on narrow streets and made it clear that if the layout of the area were being designed today, it would be completely out of the question to tolerate a 700-seat bar in this place.

A considerable amount of evidence was also presented by Mr. Jackson in viva voce evidence, affidavits and letters, in an attempt to show that the operation of Chevy's Bar on Bath Road in Kingston, a licensed establishment which has been operated for some years by Mr. Sagadore, the principal in the new company proposing to open the Manor, established that his record was such that he should not be allowed this licence.

It is the view of the Tribunal that the evidence was not sufficient to bring the Applicant within any of the clauses (a) through (f) of Section 6(1) of the Liquor Licence Act and, indeed, the Proposal to refuse to issue the licence originally, put forward by the Liquor Licence Board on February 14, 1990 in paragraph 5 thereof, confines the objection to that set out in Section 6(1)(g). We shall not, therefore, deal further with this evidence.

Before leaving the case of the objectors and of the Liquor Licence Board, the Tribunal must deal with a motion brought by Mr. Kulis early in the hearing that the members of the Tribunal make a tour of inspection of the area in question. This motion was supported by Mr. Jackson and opposed by Messrs. Scheulderman and Kuchar. The Tribunal reserved its judgment at that time indicating that it would consider it further when the evidence was otherwise completed and when it would be in a better position to decide it properly and if it decided to make such an inspection, in a better position to profit from it. The hearing of the evidence was completed in Kingston in circumstances when it was not possible at that time to deal with the motion and the question was not raised again during the argument on July 5, 1991. The Tribunal believes, however, that it should not complete the hearing without dealing with this motion and state that it reached the decision to dismiss the same and not make any inspection. Brief reasons will be sufficient therefor.

It is generally not the practice of this Tribunal to make inspections of buildings, premises or areas which are the subject matter of its hearings. The general rules of Civil Procedure in Ontario Courts indicate there should be a very strong special case to make an exception to this general practice. When an inspection is made, there is before a Court, jury or tribunal evidence which is not capable of being placed before an appellate body, if an appeal is taken and finally there is always the danger of the creation of prejudice to one or more parties which they cannot answer because they are unaware of it.

We must now turn to the evidence presented on behalf of the Applicant for the licence and of the mortgagee. The first witness on this side was Richard Morris who is a taxi driver and whose wife worked as a bartender at the Manor for quite a number of years when it was operated by Mr. Amy, Mr. Grieve and at the end by Mr. Crawford. He described the Manor as a real area landmark with nothing like the reputation into which it fell at the end under Mr. Crawford. He described it as a tightly run ship with trouble nipped in the bud. There was no question there was a rough element around in the last years. He said that, as a cabdriver, he was familiar with many licensed premises and until Mr. Crawford's time, this one was alright. He particularly wished to see it reopen under good strong management because it was the only place around big enough to incorporate a large number of sporting players and fans such as had been there in the days of Mr. Amy and Mr. Grieve. It could accommodate several baseball teams at once and had facilities to entertain them, including pool tables, shuffleboard and other things besides eating and drinking. He said that in the last years, it had really gone downhill, corroborating the evidence of other witnesses noted above. He concluded by

saying that if it were properly run as it had been earlier, it would be alright even as it had been earlier.

The next witness was his wife Cecelia Morris who has been a professional bartender for 20 years and who worked at the Manor on and off for 10 years from early in 1982, leaving and coming back again in 1984, staying to the autumn of 1985 and leaving then and returning again in 1988 and staying until the Manor was closed in 1989. At night, the Manor had a fairly young crowd, students, workers and army people from the local military establishments. The meals were good, both for lunch and at dinner and attracted many people to the Manor. When she came back in 1988, she saw the situation was not nearly as good as before, many of the patrons being people who Mr. Grieve had kept out. Mrs. Morris felt that the Manor helped make the Village unique having been there since the middle of the last century and that if it is managed properly, would not cause problems and, indeed, she got some support canvassing in the neighbourhood for its reopening. She said she would go back and work there if it reopened.

The next witness was Mr. Ronald Smith who has been the Manager for the City of Kingston of the Portsmouth Olympic Harbour for six years. He gave evidence of the extent of its operation and of the numbers of people who attend its various functions. It has a steady list of functions throughout the year; many of them attracting thousands of people. The week before, there were over 2,000 at a regatta and the following week, he expected over 3,000 and similar numbers for other regattas. They have an annual cat show which draws over 5,000 on a week-end and a kennel club show which draws over 2,500 and a festival of trees which will draw over 5,000 people. The facility also accommodates dances put on by groups such as a students from the university for which its premises are licensed for liquor and which go on to 1:00 a.m. in the morning. There is also operated on its premises a high class restaurant and some retail shops which, together with the fact that it is one of the largest and finest marinas on Lake Ontario has made the Olympic Harbour a public facility centre. This evidence established that the Olympic Harbour draws consistently into the same area and down the same streets from King Street, larger numbers of people then did and would come to the Manor.

Mr. Smith said that while it was in operation Lakeview Manor Hotel caused his operation no problems of any consequence and he said that they never had many traffic problems. There was some problem of noise emanating from the Manor disturbing people sleeping on boats in the marina at night. He also confirmed what others had said that the operation of the Manor had deteriorated substantially in its last years and described it as a "a bit of a thorn in my side" and he said he would not want that back.

However, he said he would like to see it reopened and run properly and, particularly see it cater again to the sporting events and said that he and other people he knew would attend it as patrons.

Mr. Philip Whaley lives at 783 King Street West, three streets west of Mowat Avenue. He has been an officer at the penitentiary for 22 years and was a patron of the Manor since 1961 going there an average of two to four times a week. He said that while Mr. Grieve operated the place, it was well run and the management put up with no nonsense. He told the Tribunal that up to a hundred local people attended the Manor regularly. The only rowdiness which he saw was created by Queen's University students on occasions such as the winning of a football game. Like the other witnesses, he saw the Manor go downhill under Mr. Crawford, but he believed it could be reopened and add something to the village. Right now, he said, it is derelict and an eyesore and it should be returned to its original appearance as a hotel. He said that he only saw one fight in the street when a floorwalker ejected a drunk and the cohorts of the latter attacked the floorwalker.

Mr. Scheulderman filed an affidavit (Exhibit 22) from one Sadie Lingard who has resided at 58 Mowat Avenue for 55 years and who was ill and unable to attend as a witness. She supported the application for the licence so that the reopening of the Manor would end its present derelict condition and provide employment and tax revenue to assist the community. She said that she was never disturbed by the operations of the Manor and would much rather see it reopen for its traditional use than redeveloped as another condominium in the area.

The final witness for the Applicant was Mr. Ken Sagadore, the present operator of Chevy's Bar and the proposed operator of the Lakeview Manor Hotel if it is licensed and reopened. He said that if they are able to proceed with their purchase, both he and Mr. Young would sell their present businesses and work full time at the Manor.

In setting out their plans for the new Manor operation, he told the Tribunal the following: They would change the type of clientele in the evenings by changing the style of music to draw an older crowd of an average age of early to later thirties and not the students and younger crowd. He said he was familiar with the sports orientation of the earlier Manor having played on a fastball team sponsored by it and that they would revive this orientation and sponsorship of sports teams. The Manor could accommodate six baseball teams at once.

They would target a lunch trade as well as dinner, and also provide snack type food in the evening. They would continue

to use exotic dancers and adult entertainment from 12:00 noon to 6:00 p.m., in order to attract a number of customers required in that period. These would perform in a smaller room on the second floor where persons not interested in them would not be in contact with them or the patrons watching them. He would continue the patio operation in the summer months, but close the same not later than 9:00 p.m. With regard to the exterior of the building, he would redo it completely and would seek the input of local residents with regard to this.

To help with the traffic problems, he would put in cement curbs so the patrons could only enter and exit the parking lots at certain places and put an end to the starburst effect of cars charging forth in all directions after closing time. As to the interior, he said the nice thing about the Manor is that it has such a number of rooms which can be used for different purposes.

He said that he would bring his staff from Chevy's and he would have to hire a good many more persons and he would see that everyone was properly trained and took the appropriate courses to learn their jobs in an alcohol licensed premises. He wished to make it clear that he had no intention of allowing the abuses of the last years of the Manor to reoccur. If the unwanted elements who caused trouble returned, he would take the necessary steps to deal with them. His style of operation in the first place would not attract them. If they did come, he would have floor managers to keep things under control and, if necessary, he would call the police. He said the important thing is to defuse trouble before it happens. He put forward a suggestion which he thought might help considerably with the traffic and noise problems at closing time. He suggested changing the hours of the bands playing, for them to start earlier and finish earlier - say from 8:00 p.m. to 11:00 p.m. - so that people would come earlier and stay after the music was over and so leave over a longer period of time and not all at once. The key to this would be to stagger the hours of the ending of the band music and closing of the bars.

Mr. Sagadore gave some projections as to his expected revenue saying he projected 40% from promotion of the sport's connection mentioned, 20% from business from 12:00 noon to 6:00 p.m., 15% from food sales after 6:00 p.m. and 25% from all other activities in the Centennial Room after 6:00 p.m. Divided another way, he projected 75% of revenue from liquor sales and 25% from food sales. It was apparent from these figures and indeed stated by Mr. Sagadore that it would not be viable to consider going ahead with the purchase without the liquor licence and without planning to have the exotic dancers in the afternoon and the band music in the evening. It would not, however, be necessary to run the place close to capacity to be viable.

There was a good deal of evidence during Mr. Sagadore's cross-examination concerning the operation of Chevy's, upon only one part of which we shall comment. During the discussion of some incidents of overcrowding at Chevy's and charges arising there from, Mr. Sagadore said during his evidence that he considered that some leeway should be allowed from the absolute numbers prescribed in issued licences. But on further cross-examination, he said that he never told of any of his staff to operate in that way.

The Tribunal found this statement on his part disturbing but, for reasons discussed above, does not believe that this evidence or any of the other evidence about the operation of Chevy's brings him within any of the clauses (a) to (g) of Section 6(1) of the Liquor Licence Act and, therefore, we shall not discuss any of this further.

We have set the foregoing in some detail because of the importance of the case and of its determination to the parties involved and the importance of their understanding of the basis of the decision of the Tribunal. In addition to this evidence, the Tribunal took into consideration certain jurisprudence to which we were referred by counsel.

The general approach which the Tribunal must take is well set out in the Bordeaux Restaurant case (1988) Volume 17 CRAT 1 at p.15:

The Tribunal does not accept the proposition that Section 6(1)(g) of the Liquor Licence Act is void for vagueness and, therefore, should not be applied. The position of the Liquor Licence Board is unique. It must attempt to balance the rights of the Licensee with the rights of the public at large and the Board is entitled to consider all of the evidence which relates to these conflicting rights. Counsel does agree with the submissions of the Applicant in that when giving consideration to Section 6(1)(g), no consideration should be given to the various extraneous matters such as zoning, parking, traffic and the adult entertainment licence. The licensed premises are properly zoned and the Licensee is legally licensed by the Metropolitan Toronto Licensing Commission to provide adult entertainment, which adult

entertainment, although not permitted by by-law, is a legal nonconforming use. Such matters as parking and traffic are a municipal responsibility. However, the Tribunal takes the position that the rules with respect to the interpretation of Section 6(1)(g) have been established in many prior decisions of the Tribunal and that these decisions have become entrenched and establish the rules to be followed by a licensee or Applicant. It is the responsibility of the Tribunal to hear the evidence by way of a hearing de novo and the evidence and exhibits that will be considered are that evidence and those exhibits which are tendered before the Tribunal. The Tribunal has the responsibility of hearing the evidence relating to the application of Section 6(1)(g) and making its decision on that basis.

There are some points of importance to be taken from the Fitz's Restaurant and Tavern case, a decision of the Liquor Licence Appeal Tribunal (1978) 2 LLAT 125. This was an application for the transfer or relocation of a dining lounge licence. At the bottom of p.125, the Tribunal says:

Evidence was called by counsel for the Liquor Licence Board from officers of the Metropolitan Police Department who indicated that in their view the Soul Palace Tavern while it was being operated on Yonge Street was one of the major trouble areas for the City Police and in fact it seems to be the consensus that it may well have been the worst problem spot for the morality squad.

This point must be considered in the light of the evidence that the reopening of the Lakeview Manor will put substantial strain upon an already overtaxed Kingston Police force. At the middle of p.127, the Tribunal says:

In arriving at a decision in the matter before it in this appeal, the Tribunal

reduced the major issues to two which are as follows:

- (i) The operation of the Soul Palace Tavern on Yonge Street and whether or not it was reasonable to assume that the new premises at 19 St. Joseph Street would attract the same undesirable elements;
- (ii) If the needs and wishes of the community were such that additional licences should not issue in any event.

Next, we refer to the Frosty Muggins Restaurant case (1989) 18 CRAT 34. This was a case of an appeal from a revocation of an existing licence by the Liquor Licence Board for breaches of the Liquor Licence Act by the happening of incidents, some of them similar to the complaints which we have heard in this case. Some of the comments in the judgment set out considerations the Tribunal should take into account in this case. At page 45 the Tribunal says:

This has been a long and difficult matter because the tavern seems to have acquired the schizophrenic disposition of a Doctor Jekyll by day and a Mr. Hyde by night. It performs a useful and perhaps even necessary service to its noon-time customers, a service which may even extend into the early evening. Only after 9 or 10 p.m. does it seem to change complexion becoming nothing but a bar and catering to a more unrestrained clientele. This is borne out by the evidence of the many witnesses who have come forward to express the needs and wishes of the community and the concerns of the police. We find as a fact their evidence is uncontroverted despite attempts on the part of witnesses for the applicant to gloss over the true situation.

There is, however, another factor to be considered. Despite a petition of some 300 names requesting the tavern be closed, there is a certain number in the community which welcomes the tavern using it frequently for lunch and often in the evening for a drink and entertainment. It would be unfortunate to penalize them

simply because this facility was not being properly operated. In saying that we are mindful of the fact that none of the witnesses for the Board who now support the revocation of this licence were initially against it. The evidence is that they welcomed a licensed restaurant in the area and it was only when the shabby operation of the tavern became evident that their opposition to it grew culminating in its suspension on April 3rd last.

We neither condemn nor condone the behaviour of the appellant in the conduct of his business, but must point out it is blatantly clear to this Tribunal that he has operated the tavern purely for his own gain and to the detriment of the community. The accent has been on the indiscriminate sale of liquor at the expense of food in the evenings. Drunkenness has been permitted and excessive consumption permitted if not encouraged. Two fatal accidents have occurred in the area in the past two years and although we impute no fault to Mr. Hallworth in these events, the evidence is that liquor was involved in both cases and the majority of people attending at his premises must drive.

The principals to be considered in reaching the decision required here are set out in the Elm Flameburger case (1987) CRAT 103 at p.106:

In reaching its decision, the Tribunal has been guided by the following principles which have been enunciated from time to time in its previous decisions:

- the public must be aware that under the Liquor Licence Act, a person is entitled to a licence unless he becomes disentitled under any of the clauses (a) to (g) inclusive of Section 6(1) of the Act;

- since a person is entitled to a licence, the onus is on the objector to prove, on

the balance of probability that, in this case, it is not in the public interest to issue it;

- the public interest must be determined in light of two aspects - (a) needs and (b) wishes;

- the issues of needs and wishes will not be decided solely on the basis of a head count;

- the concerns of the objectors must be bona fide; and

- the needs and wishes of the immediate residents will be given more weight than those of the transient trade.

In the Bloor Street Station case (1989) 18 CRAT 91, the Tribunal quotes with approval the passages quote above from the Bordeaux Restaurant and the Elm Flameburger cases and goes on to say at page 101:

The Tribunal has carefully considered the information presented by the witnesses on both sides of this matter. We acknowledge that there must be some current community standards in these matters and we approve of the principles as set out in the Elm Flameburger decision.

Counsel for all parties referred to the Berringer's Tavern Restaurant case (1989) 18 CRAT 48. In this case, licensed premises which had caused serious problems in the past because of improper management had been closed and the licence had lapsed because of a fire. It had been rebuilt and a new application was made for the licence being sought. This decision is authority for the legal proposition that in such circumstances, and we have them here in the Lakeview Manor case, the parties must meet the same tests and degrees of onus as in any new application for a licence. At page 52, the judgment deals with the application of the provisions of Section 6(1)(g) to the evidence:

In considering the wishes of the municipality, the Tribunal on previous occasions has stressed that the wishes of residents in the immediate vicinity are to be preferred to those more distant

residents, and the Tribunal has taken that into account. It notes that while many of the local residents had originally signed a petition against the establishment of Berringer's, Mr. Marc Janisse had obtained a recent petition from a number of local residents after the restaurant was operating which indicated a contrary view. Many of the witnesses for the objectors testified that they had not been inside the restaurant, would not go inside and did not want any commercial operation located on that site at all. It is clear Coronation Tavern may have coloured their views. But in the view of this Tribunal, the wishes of the community as reflected by the contradictory petitions are not so sufficiently clear as to satisfy the onus of the objectors to this licence application.

Counsel for both the Applicant and the mortgagee argued strongly that the substance of the residents' complaints concerned matters coming under different branches of the law and different law enforcement agencies other than the Liquor Licence Board and this Tribunal, being concerns of traffic and parking and noise regulations which are under Municipal jurisdiction, and the use of the premises themselves as a tavern which is a land use problem and they relied in this regard upon the Johnny K Restaurant case (1987) 16 CRAT 61. In that judgment, the Tribunal quoted from another recent case of the Copa Tavern and said at page 66:

It is important to understand that the Liquor Licence Board does not authorize the operations of hotels, restaurants, dance halls, etc. The Liquor Licence Board merely authorizes the provision of an ancillary service - the serving of beverage alcohol in such establishments.

In this judgement, the Tribunal went on to say at page 67:

In conclusion, although the Tribunal sympathizes with the residents who find the sounds resulting from the patio operation disturbing, the Tribunal finds that it would be inappropriate and improper to use

the discretion granted to it under the Liquor Licence Act to effect an indirect solution to what is, in essence, a land use problem.

The crux of the question to be determined by the Tribunal is whether those objecting to the issue of this licence have satisfied the Tribunal, on a balance of probabilities, that its issue is not in the public interest having regard to the needs and wishes of the municipality in which the premises are located. The municipality is the City of Kingston but, as noted above, the needs and wishes of the more local residents of Portsmouth Village must be given greater consideration than those from further away. While the issue must not be decided by a local head count, the overwhelming wish of the local community as expressed to the Tribunal is against the reopening of the Lakeview Manor Hotel. There is no doubt whatever of the honesty and sincerity of the fears of these people. The Tribunal must, however, ask and answer the question as best it can, are these fears also justified?

The Tribunal must apply the law as it exists to the facts of this case as it finds them from the evidence. While there are many people in Ontario, including several of the objectors from whom we heard at this hearing who believe that the sale of liquor with its dangers and abuses should be banned in all cases of any real question, the law is not to this effect but rather that the real Applicant is entitled to a licence except where he can be brought within specified definitions, in this case Section 6(1)(g) of the Act; otherwise, he is entitled to his chance to operate his establishment which he must do in accordance with all of the other rules and regulations or run the risk of losing his licence.

After considering all of the foregoing, the Tribunal, in this case, has come to the conclusion that the objectors have satisfied the onus upon them of establishing that the issue of this licence is not in the public interest having regards to the needs and wishes of the public. As indicated above, this decision is based in no way on any facts concerning the operation of Chevy's Bar. Nor is it based on any conclusion that the Applicant's management will exhibit the failures and weaknesses of previous management and particularly that of Mr. Crawford. It is based rather upon a conclusion that the inherent nature of the operation - its large size with 710 licensed seats or places, its nightly music from relatively large bands, its exotic dancers during the afternoon and the fact that the large number of patrons required for a successful operation must all be funnelled down the two narrow streets through and into a relatively densely populated residential neighbourhood, make it an inappropriate operation for either the Liquor Licence Board or the Tribunal to licence in such

a location. In the view of the Tribunal, this would be the case no matter how careful the Applicant would be with its management. Without taking out some of the parts of the operation, which were clearly established as essential to its success, the Applicant could not, in the view of the Tribunal, remedy these fatal defects.

We appreciate the effect of the decision on the mortgagee, but it is clearly established that the economic effect of decisions such as these upon the values of the property in question or the values of surrounding properties are not proper considerations when considering the application of Section 6(1)(g). We appreciate also the effort made by the Applicant with regard to his proposed purchase and with regard to these hearings to get his licence, but what we have identified as a fatal defect is not something which he could remedy and still have a viable operation.

Finally, we note that all or almost all of the objectors moved into the area while the Manor house was previously in operation and it was argued strongly that there is a strong element of unfairness in giving effect to their complaints subsequently. This point, however, is answered by the fact that once the licence lapsed, the Act requires us to treat the application as a new one.

Accordingly, the Tribunal by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, hereby confirms the decision of the Liquor Licence Board to refuse the issue of this licence.

**SAMMYLOU INC.
(O'TOOLE'S ROADHOUSE & RESTAURANT)**

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LIQUOR LICENCE

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
ROBERT COWAN, Member

APPEARANCES:
LARRY SILVERBERG, representing the Applicant
S.A. GRANNUM,
representing the Liquor Licence Board

DATE OF HEARING: 4 June 1991 Toronto

DECISION AND ORDER

Upon hearing submissions by counsel for the Liquor Licence Board, Mr. Grannum, and upon motion by Mr. Silverberg, counsel for the Applicant, this appeal of the Applicant will be allowed and the suspension of three days lifted. The matter is now concluded.

Accordingly, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby revokes the Decision of the Liquor Licence Board dated the 14th day of September, 1990.

712440 ONTARIO LIMITED
(NEW EDWIN HOTEL)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE LICENCE

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
GORDON R. DRYDEN, Vice-Chairman as Member
ROBERT COWAN, Member

COUNSEL: COSMO GALLUZZO, representing the Licensee

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF HEARING: 31 May 1991 Toronto

REASONS FOR DECISION AND ORDER

This is a decision in the matter of 712440 Ontario Limited (New Edwin Hotel) by way of appeal from the decision of the Liquor Licence Board dated January 18, 1990 for a three day suspension of the licence of the New Edwin Hotel based upon the serving of alcohol to an intoxicated patron.

The facts before the Tribunal consisted of the evidence of two police officers, who in passing the New Edwin Hotel on January 31, 1989, saw a woman exit the premises, fall to the ground and subsequently proceed to Queen Street where she impeded a streetcar. Subsequently, she was arrested by the police officers, charged with a liquor offence, and pleaded guilty. The other evidence of the police officers was that she was followed from the premises by an individual who identified himself to the police officers as an employee of the hotel as its doorman.

The evidence of the police officers was that the doorman indicated to them that the woman had been in the premises since 11:30 p.m. until she left at approximately 1:40 a.m., and that the hotel staff had been afraid to approach her. In their evidence before the Tribunal, the police officers elaborated to the effect that the doorman had indicated that she had been served alcohol in the premises and had been abusive which caused the hotel staff to be afraid to approach her.

There was objection to this hearsay evidence being admitted as to the truth of the contents, but the Tribunal was of

the view that Section 15 of the Statutory Powers Procedure Act permitted the evidence to be received although the question of weight to be given to that evidence, particularly in the absence of the doorman as a witness, would have to be determined by the Tribunal.

Countering the evidence of the police officers was that of Janet Morrus, a waitress since 1970 and an employee in that capacity at the New Edwin Hotel for approximately eleven years. Mrs. Morrus's evidence was given clearly and in a straightforward manner. She indicated that she was on duty on January 31, 1989, being a Tuesday night and that her normal shift is on Monday and Tuesday nights from 6:00 p.m. until closing. She also indicated that on those days of the week there is employed only one waiter because the business is slow and that she was, in fact, the waiter who was on duty on that particular date. While she could not specifically recall the particular woman, she also indicated that her recollection was that no incident had occurred on that Tuesday evening, that it was a typical quiet Tuesday. She was subjected to cross-examination and impressed the Tribunal with her candour. In the view of the Tribunal, her evidence is much to be preferred to any hearsay evidence of a doorman. It is the view of the Tribunal that the evidence of the doorman given through the police officers must be given little, if any, weight.

More significant is the fact that the police officers did not contact anyone in authority in the premises, either on the evening in question or subsequently. It is true that the officers were fully engaged in dealing with the woman who had left the premises, but the evidence was clear that no charges were ever laid against the hotel, that no one in authority at the hotel was ever contacted with respect to this incident and that the hotel was not contacted with respect to this incident until some time after the Board's Proposal of April 17, 1989, some two and one-half months after the date of the alleged incident.

Counsel for the Board indicated that there was no contact from the Board to the hotel owner from the date of the incident until the Proposal of April 17, 1989. The Tribunal is, therefore, concerned that no opportunity was given to the Licensee to investigate or deal with the issue.

In the Board's decision of January 18, 1990, the Board stated as follows at page 3 of its decision:

There is no doubt and the Board finds as a fact that the female was intoxicated...Although there is no

direct evidence of service, the Board finds on a balance of probabilities that the female patron did spend over two hours in the New Edwin Hotel on the night in question and early morning of the following day and was either in an intoxicated, drunken condition throughout or was served while intoxicated.

In the view of this Tribunal, the Board in its decision clearly indicates a lack of direct evidence relating to the serving of this individual in the premises and the Tribunal has before it the direct sworn testimony of Mrs. Morrus to the contrary.

In addition, the Board in its decision went on to say as follows:

The licence holders are experienced and have an almost unblemished record.

In light of this statement, particularly in view of the paucity of evidence in support of the proposition that anyone sold or supplied liquor or permitted it to be sold or supplied to a person in or apparently in an intoxicated condition as required under Section 43 of the Act, to suspend the licence of a applicant even for a period of three days based on the particular incident occurring on January 31, 1989 would be not only unfair, but unreasonable.

Therefore, pursuant to the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby revokes the Decision of the Liquor Licence Board dated January 18, 1990.

644999 ONTARIO INC.
(BROADVIEW TAVERN)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LIQUOR LICENCE

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
GORDON R. DRYDEN, Member
ROBERT COWAN, Member

APPEARANCES:

RICHARD I. KESTEN, representing the Applicant

RICHARD E. KULIS, representing the
Liquor Licence Board

DATES OF

HEARING: 28 June 1991

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Decision and Order of the Liquor Licence Board made pursuant to Section 12(5) of the Liquor Licence Act to suspend the liquor licence of Broadview Tavern (644999 Ontario Inc.) for a period of seven days. The decision was dated March 26, 1990.

The basis for the suspension was that the past conduct of the officers or directors of Broadview Tavern afforded reasonable grounds for belief that the business of the tavern would not be carried on in accordance with law and with integrity and honesty and that the Licence holder was in breach of a term and condition of its licence.

The Proposal of the Liquor Licence Board stated that contrary to Section 43 of the Act, Broadview Tavern sold liquor or permitted liquor to be sold to a person in or apparently in an intoxicated condition, the whole contrary to subsection 8(4) of the Regulations. It alleged as well that contrary to Section 44(1) of the Act, Broadview Tavern knowingly sold liquor to a person under the age of nineteen. Other contraventions cited in the Proposal were not pursued at the hearing before this Tribunal.

The facts are as follows:

The Licence holder is a corporation and is the holder of a licence under the Liquor Licence Act for a tavern premises known as Broadview Tavern.

The officer, director, and shareholder of the licensee Corporation is Harold Kamin.

The licensed premises are a dining room in the southwest area of the main floor and two lounge areas in the northeast and southeast sections of the main floor.

A prior Proposal to suspend a liquor licence of the Broadview Tavern dated March 21, 1988 was withdrawn on February 28, 1989. The reasons for the Proposal were mainly that the Licence holder permitted liquor to be sold to a person in or apparently in an intoxicated condition and permitted drunkenness in the licences premises. That Proposal was withdrawn because the Liquor Licence Board found special circumstances existing which led to the belief that the unlawful behaviour would not reoccur. The belief that there would be no further reoccurrence was in turn based on the fact that the new owners of the tavern had taken over an establishment which was in deplorable condition and through substantial investments in capital had completely changed the premises as well as the clientele. Police officers who had visited the premises in its prior condition and its new condition testified that the difference in the establishment and the clientele was as that between day and night.

On March 14, 1989, at approximately 11:45 p.m., police visited the premises and noticed a woman in a state of undress staggering around trying to get herself dressed. The police further observed that the woman, whom they considered intoxicated, consumed two additional glasses of wine and a glass of what appeared to be a liqueur.

For that reason, on June 15, 1989, the Board issued a new Notice of Proposal proposing a suspension of 14 days of the liquor licence.

By registered letter dated August 15, 1989, the Board gave notice that it would amend the Notice of Proposal by increasing the proposed suspension from 14 days to 28 days. The basis of this amendment was that a further infraction was committed by the tavern; viz., serving liquor to a person under the age of nineteen.

In its decision dated March 28, 1990, the Board found that Broadview Tavern had sold liquor to a person under the age of nineteen and had also continued to supply liquor to a staff

employee already in a state of intoxication. It decided to suspend the licence for only seven days rather than the 28 days sought because the new owners of the tavern had completely turned its operations around since acquiring it. The Board did this despite the fact that a previous Proposal to suspend had been withdrawn for precisely the same reason.

It is from this decision that Broadview Tavern has appealed to this Tribunal.

The Tribunal notes that at the hearing before the Board, counsel for the tavern advised the Board that he was not disputing the fact that a patron was served to the point of intoxication and that a minor was served.

The first witness to testify on behalf of the Board was Constable Paul Knight, a member of the Toronto Police Force. He stated that on March 14, 1989 at 11:45 p.m., he went to Broadview Tavern. He was in plainclothes. He saw a female sitting at the bar in an apparently intoxicated condition. He noticed that her speech was slurred, her eyes bloodshot, her clothes in disarray; nevertheless, she continued to be served wine. Constable Knight also saw certain patrons touch her clothing.

At one point, the doorman came to talk to her but she was allowed to continue drinking at the bar. Constable Knight then went to the doorman and ordered him to evict the woman, which he did. When Constable Knight spoke to her outside the premises, he noticed liquor on her breath and found that she was in a generally intoxicated condition. Once assured that another person would see to her returning home safely, he allowed her to leave.

In cross-examination, the Constable said that the tavern was much improved. At this point, the Board also admitted that the tavern was now far better than it was before.

He also declared that one drink would be enough for him to notice alcohol on the breath of a person.

He further testified that the woman was employed by the tavern as a stripper, but that this did not explain her clothing being in disarray.

In defence, Mr. Harold Kamin testified that he was not on the premises at the time of the incident. His testimony on this matter was solely that the tavern itself had been much improved since he became the owner, and that the establishment had rules that employees should behave and be treated in the same manner as other patrons. It was, therefore, against the rules of the tavern

for an intoxicated person to be served alcohol.

In argument, counsel for the tavern declared that the fact that there was liquor on the woman's breath only showed that she had at least one glass of wine but not that she was intoxicated. The fact that she had bloodshot eyes might be explained, he argued, by the tobacco smoke in the tavern. Her behaviour, however excessive, did not prove that she was intoxicated.

The Tribunal cannot accept this interpretation of the facts. While liquor on the breath, redness of eyes, or excessive behaviour might not individually prove drunkenness, taken together they most certainly do. Furthermore, Constable Knight, with sixteen years experience on the Police force, can be presumed to distinguish between a person who is intoxicated and one who is not.

Finally, the Tribunal notes that at the original hearing before the Board, the tavern owners did not dispute that she was served to the point of intoxication. The Tribunal finds, therefore, that the Board has established that contrary to Section 43 of the Act, Broadview Tavern sold or supplied liquor or permitted liquor to be sold or supplied to a person in or apparently in an intoxicated condition. Broadview Tavern raised no evidence to disprove this finding.

The next witness to testify on behalf of the Board was Sgt. Kyle Williams who stated that he went to the tavern on April 29, 1989 at 11:55 p.m. with two other policemen. All were in plainclothes. Almost immediately upon entering, he noticed among the male patrons, a male who seemed to be less than 19 years old. When he spoke to that person, he admitted that he was 18 years of age.

In cross-examination, Sgt. Williams stated that the person was born February 28, 1971 and was sitting in the dining lounge area. He saw the minor drinking beer from a glass which was the same as others provided by the tavern.

Sgt. Williams also testified that this was the first time he had encountered any problems in the tavern since the new owners had taken over.

In defence, Harold Kamin testified that he was not present the night of the alleged violations, but that the Regulations of the tavern issued to employees strictly forbade the service of liquor to those under age. He went on to state that he has hired sufficient staff to assure that no one under the age of 19 is allowed to consume alcohol. He testified that the penalty

for allowing alcohol to be served to those under age was being fired.

No witnesses were presented by Broadview Tavern to make proof as to what exactly happened on the night of the alleged violations. There was no evidence as to how the minor was allowed to be served beer and of what particular measures had been taken that night to assure that no minor would be served alcohol.

The Board deposited a document entitled "Information under Section 24 of the Provincial Offences Act" by which the minor pleaded guilty to the offence of consuming liquor while under the age of 19.

By virtue of the proof made, the Liquor Licence Board has proved that Broadview Tavern did serve alcohol to a minor. The burden of proof then shifts to the tavern to prove that the minor was not apparently under the age of 19 years when he gained entry to the tavern. The Applicant would present the employees on duty that night to testify on the specific precautions taken (e.g. asking for identity cards) and to prove that despite all reasonable measures taken, somehow the minor was able to gain entry either because he looked like an adult or had evidence upon which the tavern employee would be entitled to believe that he was over 19. In the present case, the tavern failed to present any such evidence.

The fact that the police officer noticed the minor immediately upon entering establishes that he did indeed appear to be under the age of 19.

The Tribunal notes as well that at the hearing before the Board the tavern did not dispute this finding.

The Tribunal therefore finds that Broadview Tavern, contrary to subsection 8(6) of the Regulations, failed to ensure that evidence as to the age of persons satisfactory to the Licence-holder was obtained prior to permitting a person apparently under the age of 19 to be served liquor.

Given these findings, is the suspension of seven days proposed by the Liquor Licence Board unreasonable? The Tribunal notes that while a Liquor Licence Board counsel recommended a 28 day suspension, the suspension proposed was reduced to 7 days because of the great improvement the new owners had made in the operations of the tavern.

The Tribunal agrees with the following observation of the Board in its judgement of March 26, 1990:

Service to minors is a most serious matter. Over-service to the point of intoxication to staff members and employees is of particularly serious concern. Licensees and their staff must set an example if they hope to maintain control of their establishments and comply with the Liquor Licence Act and their Regulations.

Given the seriousness of the infractions by the Broadview Tavern and the fact that they arose in March and June of 1989, one and four months respectively after the tavern's appearance before the Board on the Proposal which was withdrawn, the Tribunal finds that a suspension of seven days is not unreasonable.

Therefore, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal confirms the decision of the Liquor Licence Board dated March 26, 1990, whereby it ordered that the liquor licences of 644999 Ontario Inc., operating as Broadview Tavern, Toronto, be suspended for a period of seven days; and directs the Board to set the date of commencement of the said suspension.

607123 ONTARIO INCORPORATED
(LIDO'S IN THE BEACH)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE LICENCE

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
NEIL VOSBURGH, Member

APPEARANCES:
JERRY LEVITAN, representing the Applicant

RICHARD E. KULIS, representing the
Liquor Licence Board

DATES OF
HEARING: 18 April 1991 Toronto

REASONS FOR DECISION AND ORDER

Pursuant to a Proposal dated December 28, 1988, and two Supplementary Notices of Proposal dated June 14, 1989 and October 19, 1989, the Liquor Licence Board advised the appellant that it intended to suspend its licence for a period of 30 (thirty) days. There were several grounds cited in the Proposals which are not now material to this appeal.

The matter came before the Liquor Licence Board on January 18, 1990, and after hearing considerable evidence, the Board suspended the tavern licence for a period of 14 (fourteen) days. It is from that decision that the appellant now comes to this Tribunal in his appeal.

The evidence brought before the Board has not been offered to this Tribunal since counsel have agreed to both the admission of one of the offenses and on the terms which should be imposed by way of a suspension. It is admitted that there was an offence on November 5 and one on November 6, 1988, in which the tavern owners were guilty of allowing an excess number of people in the tavern resulting in considerable overcrowding. This is the only ground for the several Proposals which has been admitted before this Tribunal today. It is apparent, however, that no evidence is to be offered counsel having agreed upon the suspension and its term.

Mr. Kulis pointed out to the Tribunal on behalf of the Liquor Licence Board that a Proposal of a 3 (three) day suspension was made by Mr. Levitan, counsel for the appellant, and both counsel have agreed to this arrangement. The Tribunal sees no reason to disturb this decision between counsel.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal orders that there will be a 3 (three) day suspension of the licence of Lido's Tavern, otherwise known as 607123 Ontario Incorporated, for a period of 3 (three) days; the dates to be set by the Liquor Licence Board.

JOHN SMART

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO ALLOW THE LICENSEE TO OPERATE AN OUTDOOR
PATIO AS PART OF ITS LICENSED PREMISES
AT 912 BANK STREET, OTTAWA

RE:
FAT ALBERT'S RESTAURANT

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding
J. BEVERLEY HOWSON, Member
THOMAS KROEGER, Member

APPEARANCES:

JOHN SMART, appearing on his own behalf
ERNEST TANNIS, representing the Licensee
RICHARD E. KULIS, representing the
Liquor Licence Board

DATE OF HEARING: 18 January 1991 Ottawa

REASONS FOR DECISION AND ORDER

Fat Albert's restaurant is a licensed premises operating from a former gasoline service station on a corner property at 912 Bank Street in Ottawa. The Liquor Licence Board held a hearing in Ottawa on March 27, 1990 to consider the Proposal of September 14, 1989 to refuse to issue a 35-seat patio licence for a portion of the property pursuant to Section 6(1)(g) of the Liquor Licence Act. That reference states:

(g) in the case of an application for a licence, the issuance of the licence is not in the public interest having regards to the needs and wishes of the public in the municipality in which the premises is located.

At the hearing, there were four reasons in the Proposal to oppose the granting of the licence. These were that the patio on the premises is adjacent to a residential area, that the area

has experienced a significant increase in noise and traffic, that the area has reached the saturation point for licensed premises and an additional licence is neither needed nor wished, and that there is a strong objection to the issuance of the licence from across the street.

The only objector to the granting of the licence was John Smart, who lives one and a half blocks away from this corner. At the hearing, Mr. Smart led the Board to infer that he represented the residents of a large senior citizen's apartment building across the street from the premises and also those in an apartment building behind the location.

Letters were presented by the Applicants to counter that inference with that of the Manager of the senior citizen's building actually supporting the Proposal and commenting as to how much the seniors have appreciated the existing facilities. The property Manager of the apartment is an employee of Mr. Ralph Tannis, the President of the applicant Corporation and he denied that Mr. Smart had any authority to represent the owners or tenants of that building.

Mr. Smart had no others with him nor had he any petitions of objections from occupants of the two adjacent buildings, nor from anyone else in the immediate neighbourhood.

There was also filed by Mr. Smart a letter from the area M.P.P. questioning the value of another licence and a further letter in clarification from him was filed by the Applicant which withdrew any objections.

For the Applicant, Mr. Ralph Tannis spoke of his 21 years in the restaurant business, his many establishment with liquor licences and his perfect record of no complaints to the Liquor Licence Board. He operates patios in four other locations, and had a 10-day patio licence for 100 seats during the special occasion festival in 1989. That area covered his entire parking lot and there were no complaints from anyone about the operation.

The Counsel for the Board noted that there had been no complaints or objections from any immediate residents so that the first and fourth reasons on the Proposal were in error. The second reason of increased noise and traffic was a matter that was not really within the jurisdiction of the Liquor Licence Board in his opinion.

In his evidence, Mr. Smart asked the Board not just to think of the interest of the Applicants but of the residents and the city as a whole. The Board did not agree to interpret the

Liquor Licence Act in the manner in which Mr. Smart sought. The Board stated:

As no one else has either attended this Hearing or objected to this application, the Board does find that in this particular case a single objector whose interest is not significantly affected in an adverse manner is not sufficient grounds upon which to refuse to issue a licence based upon the public interest.

Mr. Smart was not added as a party to the application and the Board ordered the issuance of the patio licence subject to final inspection and receipt of all supporting documentation.

Mr. Smart sought to be granted legal status within the Liquor Licence Act to advance an appeal of the decision of March 27, 1990. That application was heard in Ottawa on May 14, 1990 (1990 CRAT) and the Tribunal stated:

(1990 20 CRAT 589)

We also note the use of the word "aggrieved" in Section 14(1) and conclude that Mr. Smart believes he is aggrieved because of a loss of quiet enjoyment of his home and a possible lowering of property values, as well as by greater traffic and noise strains in his neighbourhood.

In order to be fair in this particular matter, the Tribunal has decided to exercise the discretion given under Section 14(5) of the Liquor Licence Act and specify that Mr. John Smart is a party to the proceedings herein and can accordingly proceed with an appeal of the decision of March 29, 1990, to grant the patio licence.

Today we are hearing Mr. Smart's appeal against the decision of the Liquor Licence Board to grant the patio licence. Counsel for the Board noted that ownership of the Licensee changed and upon a bankruptcy by the new owners, a Trustee took over and kept the business operating. A new group headed by the prior owner, Mr. Ralph Tannis has purchased the assets of the business and has applied for a transfer of the liquor licence. If this

appeal is unsuccessful, the approved licence transfer would include the right to have a 35-seat patio.

Mr. John Smart advanced four reasons as to why this addition to the licence should be reversed as follows:

1. There was at least one serious defect in the process followed by the Liquor Licence Board of Ontario in hearing the original application.
2. The persons who made the original application of the Liquor licence Board for a patio licence for these premises are no longer the owners of the premises.
3. Allowing an outdoor patio licence to operate at this address would cause a deterioration in the quality of life in the neighbourhood in which the premises are located and for the persons who live in that neighbourhood.
4. It is inappropriate at this time to grant such a licence at this address because of pending decisions to be made in the near future by the City of Ottawa governing the location and regulation of patio restaurants in the city, reduction of outdoor noise in Ottawa, and future development in of the area in which these premises are located.

As his first reason, Mr. Smart further wrote that "the defect in the LLBO's handling of this licence application is shown by the its attempt to prevent me from appealing their decision to this tribunal".

Since this Tribunal is hearing the appeal today, any failure of procedure which Mr. Smart may see has been cured by the opportunity to entirely review the matter before this panel. It would be incorrect for the Tribunal to reverse any decision just upon the ground of some apparently defective procedure earlier, when the merits can be fully considered today.

As the second reason, Mr. Smart noted that a business transfer had taken place from Randa Food Systems to Emile Kanim to a Trustee in bankruptcy, and may now go back Mr. Ralph Tannis and a group of others as Fat Albert & Ralph Inc.

He objects that Mr. Ralph Tannis of Randa Food Systems appeared before the Liquor Board Licence Board on March 27, 1990 as President of the Corporate Licensee/Applicant although the ownership was in the process of being changed or may, in fact, have been changed.

The Tribunal notes that we are not here to discuss a transfer of licence from which there is no appeal to this Tribunal. The question before us is only that of the public interest having regards to the needs and wishes of the public in Ottawa. We understand that the licence has been granted as of May 31, 1990, subject to the installation of certain washrooms and Ottawa Department of Health certification as to their sufficiency. Since the Trustee in bankruptcy did not have funds to complete that work, the new owners, we are told, will do so and then complete the documentation required by the Liquor Licence Board so that the patio licence can be issued.

The third issue raises the quality of life theme in the neighbourhood. Mr. Smart states that his home one and a half blocks away will have its value lowered by these premises. He put before the Tribunal the letter of the Hon. Richard Patten, M.P.P. for Ottawa Centre which is dated August 11, 1989, and referred to the location of a senior citizen building across the street and the interference which would result to its occupants by this patio.

These things were advanced at the time of the hearing of May 14, 1990, and were refuted by the Applicant who provided further letters from Mr. Patten and from the Management of both adjacent large buildings that apparently showed no concerns about the granting of a patio licence by them.

Those letters were again filed by Ralph Tannis to show that Mr. Smart had concerns for people who apparently did not have the same concerns.

The Hon. Richard Patten noted that no objections or complaints had been received from constituents. He suggested a canvass of the two major buildings nearby which, in fact, was done and letters were filed concerning no objections from those locations. While Mr. Smart raises the question as to whether or not the writers of the letters in fact speak for the occupants, he has not chosen to obtain any signatures on petitions or bring any

other witnesses from those buildings who would support his views. A further letter in support of the granting of the patio licence from the local Alderman for the Ward was filed by Ralph Tannis, claiming no objections to the application for the patio licence.

Ralph Tannis for the Applicant Licensee noted that this business is in a busy commercially-zoned area, on a four lane major street, across from Lansdowne Park where many major sporting events are held. A special occasion licence for a 100-seat patio filled the parking lot in 1989 without any complaint from anyone.

Mr. Tannis is a Director of the Central Canada Exhibition and states that the Park may be improved by some \$300,000,000 spent on facilities there. In his opinion, Mr. Smart is the only person who opposes this modest patio and cannot be said to represent the public interest. Notice of applications, such as this, is on the windows of the building for any neighbour to learn about and also was printed in newspapers; and there have been no comments from anyone. Mr. Smart has had two years to gather support and has not done so.

The fourth reason was commented upon by counsel for the Liquor Licence Board, who noted that the matter of some possible pending Municipal decisions cannot be considered by the Tribunal. The Tribunal agrees that there is no evidence of these matters before us today.

The Tribunal has concluded that there is a right for anyone to obtain a liquor licence in Ontario subject to the exceptions in Section 6 of the Liquor Licence Act. As Mr. Smart is the only objector to this application, he cannot be said to represent the public of Ottawa.

Accordingly, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal confirms the decision of the Liquor Licence Board dated the 27th day of March, 1990.

JOHN PETER VOLK

IN THE MATTER OF
DAVID CULLEN AND BERTHA WALSH
(THE GALLEY HARBOURSIDE)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

ORDERING THE ISSUANCE OF THE INTERIOR DINING ROOM
DINING ROOM LICENCE SUBJECT TO THE FOLLOWING
TERM AND CONDITIONS

- the sale and service of liquor shall cease
at 10:00 p.m. daily;
- both applicants to complete the Server
Intervention Program course

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
J. BEVERLEY HOWSON, Member
ROBERT COWAN, Member

APPEARANCES:

JOHN PETER VOLK - Applicant
THOMAS A. KELLY - representing Cullen and Walsh
STEVE GRANNUM - representing the Liquor Licence Board

DATE OF
HEARING: 30 April 1991 Beaverton

REASONS FOR DECISION AND ORDER

In 1989, David Cullen and Bertha Welsh applied for a liquor licence for a dining lounge and a patio for the premises known as The Galley Harbourside in Beaverton.

The location is in a park setting on the south side of the river entrance to Beaverton. The premises is the easterly one of a row of eleven narrow lots, where the others are second floor cottages above boathouses. The premises has been a snack bar and variety store for perhaps 30 years, and a full year-round operation is proposed.

To the east there is a parking area and boat launching ramp and then there is a further row of 12 narrow cottage properties, some ten of which are owned. All of the other premises are on land leased from the Town of Beaverton.

After a public meeting held on August 3, 1989, a Notice of Proposal to refuse to issue a licence was made for the reasons stated that:

Particulars of the public interest are:

The premises will become a source of noise and nuisance to surrounding residents and will also reduce the privacy of neighbouring residents.

Mr. Cullen is currently in violation of the Township Restricted Area Development Control By-Law.

Such other reasons as persons may give at a hearing.

On appeal from that decision, the Liquor Licence Board at a hearing on September 13, 1989 granted a licence for the interior dining lounge, apparently for some 64 seats.

At the hearing, John Volk whose cottage is beside the premises, was added as a party to be the spokesman for those objecting to the granting of a licence.

The request for a patio dining lounge licence was withdrawn by the Applicants to accommodate the objections of Mr. Volk whose property would be only 4' away from that area, and to comply with the views of the Township of Brock that such a patio would contravene the restricted area zoning By-Law of the Township.

Petitions and letters both in favour of the licence and opposed to it were filed by the parties. The Liquor Licence Board found:

that the objectors and the Board have not met the onus placed on them to overcome the applicants' right to obtain a liquor licence. In this case, the public interest can be met by the imposition of TERMS and CONDITIONS which have been consented to by the applicants.

The Liquor Licence Board granted a licence subject to a 10 p.m. sale and service cessation daily and subject to the Applicants completing the Server Intervention Program.

Mr. John Volk ("Volk") has appealed that decision to this Tribunal, and after several adjournments the matter was heard in Beaverton on April 30, 1991.

In his evidence, Volk reviewed the location of these premises in a 7 acre park along the river. His cottage is next door and there is a play area across the lane with newly-installed equipment that attracts children and families to the park for picnics and recreation. Volk and his father before him have had this cottage for 31 years; and the snack bar operation has existed throughout their occupancy.

Boaters can purchase gasoline from pumps on a separate piece of Federally-leased area beyond the low water mark, which business is separately run by David Cullen along with a fishing bait operation. A ramp to allow boats entry to and exit from the water is off the parking area and is used by many cottagers on an adjacent island.

Volk questioned the need for a licence in a family park area, was concerned with possible accidents from drinking drivers and questioned the claim of the applicants that \$100,000 had been spent to renovate the premises.

While the park area has been improved with a paved road, one way signage and posts to control parking; he was concerned with the statistics showing alcohol related problems to be the main cause of snowmobile accidents and a very major factor in boating mishaps. In winter, the lane to his and the other westerly cottages is used for access to ice fishing huts and skidoo travel on the lake. The parking lot is always crowded and inexperienced drivers with boats in tow could cause accidents where alcohol becomes just another factor in the park.

Volk mailed out 1,000 petition forms to oppose the granting of the licence, and filed 75 replies from some 140 persons opposing the licence.

Also there were 18 opposition letters received by the Tribunal in 1990 and 5 in 1991. The Clerk of the Township of Brock wrote to the Liquor Licence Board to review the Council Minutes of March 5, 1990 which stated:

GENERAL ITEMS & INQUIRIES

- (1) Clerk's Report re: application for liquor licence at the Galley Harbourside Restaurant

Council discussed the presentation made to the Township Planning Committee on February 26, 1990, by Mr. John Volk concerning the matter of an application for a liquor licence by David Cullen and Bertha Walsh (The Galley Harbourside).

Council instructed the Clerk to inform the Liquor Licence Board of Ontario that the municipality did not object to the Board, upon notification of the application to licence The Galley Harbourside, due to the "Wet" designation of the Beaverton area. The municipality acknowledges the Board's authority with regard to the licensing process, however, wishes to inform the Board in this instance, that the municipality owns and maintains a Public Park (The Beaverton Harbour Park) adjacent to the premises under consideration for a liquor licence and that it should be noted that a number of children frequent this area on a regular basis.

Volk was particularly concerned with the terms of the relationship between the Applicants and Terry and Janice Fifield who appear to be the current operators of the business under a form of management agreement; and he questioned the ability of the Liquor Licence Board to grant a licence where managers or perhaps Lessees are in place where the Board is not apparently aware of this arrangement.

Police Constable Sam Fox of the Durham Regional Police is assigned to the Beaverton area. He noted that the park has no sidewalks so that many persons walk on the paved roadway which is at the end of a one-way street.

He also observed on the use of the park area by children and the crowded parking lot on most days with its 45 marked spaces. There is no retaining wall to prevent a car from perhaps driving into the river and the policing of drinking drivers on skidoos in winter or as boaters is virtually impossible. With the diversions and distractions of the area, he would prefer that liquor not be added to the scene.

Nine other local witnesses reviewed the general concerns of Volk. They voiced concerns about parking; children crossing the road from the playground to washrooms; the sufficient availability

of liquor in Beaverton since five other locations in the Town, along with Special Occasion Permits for the arena and curling club and fairgrounds exist; and the increase of local vandalism and littering.

Terry Fifield and Janice Fifield are referred to as "the Manager" in a curious home-drawn document presented to the Tribunal. The "Owner" is shown as David Cullen and Beth Cullen and a one year management contract is said to be in effect from November 1, 1990 for a total of \$24,500 with certain monthly payments being paid from the revenues of the premises. The Owner retains the right to make "such reasonable changes and improvements and alterations as the Owner may from time to time decide in respect of the Managed Premises." The Agreement can continue from year to year with a 1% annual payment increase. The Agreement is subject to certain terms and conditions attached which appear to be two pages taken from a general lease form in that the parties become suddenly referred to as "Lessor" and "Lessee" although the connection to the use of those terms is not made within the actual two page Agreement.

Terry Fifield is, in effect, the Manager of this business and had experience in such work over 14 years in the United States. He makes the daily decisions in the operation of the business although David Cullen and Beth Welsh Cullen do participate. He is not on the application for the liquor licence as a manager, and from comments made by counsel on behalf of the Liquor Licence Board, there was no awareness of this agreement before this hearing. Accordingly, its terms and conditions would have to be reviewed by the Liquor Licence Board before any licence was, in fact, granted for the premises if the Tribunal should agree to do so.

Beth Welsh reviewed the history of the premises and she and David Cullen bought it in September 1986. They intended to upgrade the business and turn the location into a full dining facility; with a new name and extensive renovations. She said that no difficulties were expected with the liquor licence application since the community is in a "wet" area. While \$10,000 worth of renovations were expected on the Building Permit, some \$120,000 is said to have been spent as the kitchen was moved and various health and fire safety concerns were met. The premises were taken down to the interior walls with new wiring, a new exhaust fan system and furnishings provided.

She and David Cullen hold the property under an Assignment of Lease from a head lease given by the Corporation of the Village of Beaverton to Royden Currie which expires on August 1, 1993. She reviewed certain of the letters written in support

of and in opposition to the granting of the liquor licence as they were provided at the hearing before the Liquor Licence Board. She stated that certain of the persons formerly in opposition to the granting of the liquor licence are now in favour; while on cross-examination from Mr. Volk, she acknowledged that some of the persons who had been in favour of the granting of the liquor licence had apparently now changed their minds and were opposed to it. None of the persons who were said to have changed their opinions with respect to the premises, were presented by either the Applicants or Mr. Volk to the Tribunal.

In conclusion, Volk stated that public opinion is opposed to this licence application as it would be on a parcel of land owned by the Town of Beaverton for a business which ran satisfactorily for many years as a snack bar and light lunch operation without a liquor licence.

He is concerned with the parking, traffic and playground issues and believes that the availability of beverage alcohol inside the restaurant poses a risk to persons in the park. He believes that the Applicants wish to benefit from increased revenue expected by servicing boaters, snowmobilers, and ice fishermen who may abuse alcohol on their visits to the premises.

Counsel for the Liquor Licence Board informed the Tribunal that the concerns of those in opposition with respect to two items appearing in Section 8 being Terms and Conditions of a Licence pursuant to Ontario Regulation 581/1980 were not shared by the authorities of the Liquor Licence Board. These two items are as follows:

- (28) No holder of a licence shall operate or permit to be operated any business from the licensed premises other than the sale of liquor and food, articles incidental thereto, and lottery tickets distributed for sale under a government licence.
- (29) No part of a property containing a licensed premises owned or controlled by a licensee shall be used for the retail dispensing of gasoline.

In the view of the Liquor Licence Board, the business to be operated from the premises is primarily that of the sale of liquor and food, so that the adjoining operations with respect to the fishing bait business is not a concern. The Tribunal was further advised that the matter with respect to the retail dispensing of gasoline is no longer in effect, so that a liquor

licence would no longer be denied on those grounds. He was concerned with respect to the management agreement document that had been filed with the Tribunal and noted that the grant of any licence might have to be transferred to the Lessees if Terry Fifield and Janice Fifield were such, or in any event if they were said to be managers of the premises, approval of the Liquor Licence Board would have to be obtained for their continuing involvement in the business. He was also of the view that all four persons should complete the Server Intervention Program if a liquor licence was granted.

Counsel for the Applicants agreed to a review of the management document as a term for the granting of any liquor licence so that such a document could be approved either as it was or as it should appropriately be amended. He acknowledged that various local residents do have valid and legitimate concerns with respect to liquor licence issues in the area of The Galley Harbourside, but noted that the municipality is responsible for roads, parking and traffic and that these are land use or planning concerns which are not the function of the Liquor Licence Board to base their decisions upon. While all objectors are concerned about possible risks to children and other pedestrians in the park, these risks have generally always been there and the local scene will not be made worse by the opportunity of persons inside The Galley Harbourside to enjoy an alcoholic beverage with whatever food they have ordered.

He stated that it was wrong to presume an improper serving of alcohol and that the rules and regulations of the Liquor Licence Board would be followed by the Applicants. Special Occasion Permits in the park area and in the adjacent area served by the curling club and the fairgrounds do exist now and have apparently not caused any difficulties or problems for the community. In his view, the variety of objections made by persons in the community relate to external problems and there has been little or no comment on the practical suitability of these premises to have a liquor licence.

The Tribunal having considered the evidence brought forward at the hearing, and having reviewed the record of evidence and the other exhibits which have been provided, agrees with the Liquor Licence Board that the various objectors have not met the onus placed upon them under Section 6 of the Liquor Licence Act. Entitlement to the issuance of a licence is the right of an Applicant except where the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located. Because of the effective equal division of opinion within the community as to the practicality of the granting of a liquor licence to these

premises, and since the application no longer seeks the granting of a patio licence, the Tribunal is of the opinion that the liquor licence should be granted subject to certain terms and conditions.

Accordingly, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal alters the Decision of the Liquor Licence Board dated the 25th day of October, 1989, and orders that an interior 50-seat dining lounge licence be granted to David Cullen and Bertha Welsh in respect of the premises operating as The Galley Harbourside, Beaverton; and orders that the following Terms and Conditions be attached to the said licence:

1. The sale and service of alcoholic beverages shall cease at 10:00 p.m. daily;
2. The Applicants and Terry Fifield and Janice Fifield are all to complete the Server Intervention Program (S.I.P.) Course offered by the Addiction Research Foundation by September 1, 1991;
3. The Liquor Licence Board is to approve the filed management document as may be amended before the licence is granted.

NOVA FUNDING

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MORTGAGE BROKERS

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
MURRAY SUSSMAN, Member

APPEARANCES:

MRS. ORITTE T. NOVACK, its agent

EDWARD WREN, representing the Registrar under the
Mortgage Brokers Act

DATE OF
HEARING: 29 January 1991

Toronto

REASONS FOR DECISION AND ORDER

The Registrar's Proposal is based upon the past conduct of the Applicant indicating that the Applicant will not carry on business in accordance with law. The facts upon which such decision is made are based upon the failure of Mrs. Novack carrying on business as Nova Funding to submit audited financial statements for the period ending May 31, 1988, pursuant to Section 3(6a) of Regulations 662 under the Mortgage Brokers Act. Further particulars were alleged with respect to Mrs. Novack's failure to respond to requests to do so by the Registrar.

The facts presented to the Tribunal indicated that Mrs. Novack successfully completed the mortgage broker's course in 1986, and was duly registered as a broker under the Mortgage Brokers Act on November 18, 1986. The evidence indicated that at that time, renewal was required two years thereafter and that subsequently renewal was required annually on the anniversary date of registration.

The evidence indicated further that Mrs. Novack failed to renew her registration on November 18, 1988. The Registrar's office contacted her subsequently and ascertained that Mrs. Novack had given birth to a son in the month of November and accordingly she filed a further application with the Ministry on January 23, 1989. In view of the circumstances, the Ministry chose to consider the application filed in January 1989 as an application for renewal.

Mrs. Novack testified that she took a maternity leave

from prior to the birth of her son in November 1988, through to March of 1990, when she became employed by Nationwide Investment Funding Inc., at which time she filed an undertaking with the Ministry to operate under Nationwide's mortgage broker licence and not under her own, which the representative from the Registrar's office indicated was an acceptable practice.

Mrs. Novack's evidence was to the effect that she commenced business on her own in early 1987, and continued on until the Spring of 1988, and that essentially she conducted no business as a mortgage broker thereafter until the commencement of her employment with Nationwide in March of 1990, where she continues to be employed on a part-time basis.

Section 3(6a) of Regulation 662 provides as follows:

Every mortgage broker shall file with the Registrar on or before the 30th day of June in each year a copy of its most recent financial statements audited by a person licensed under the Public Accountancy Act.

It was acknowledged by the witness on behalf of the Registrar that the first fiscal year for which a report was required was May 31, 1988. Because of the proximity of the fiscal year end of Nova Funding to the June 30th filing date, there was some confusion as to when such statement was required to be filed: June 30, 1988 or June 30, 1989. From a practical point of view, the Tribunal notes that it would be virtually impossible to file by June 30, 1988, an audited financial statement pertaining to a fiscal year ending May 31, 1988. In any event, it appears that the Registrar did not raise any objection in that regard either in November 1988 or in January 1989, when it accepted the renewal application of Nova Funding. It was not until May of 1989, that Miss Brooks, the review officer for the Ministry, contacted Mrs. Novack to request the financial statements for the fiscal period ending May 31, 1988.

The evidence given indicated that Mrs. Novack spoke to Miss Brooks in June of 1989, informing her that she would speak to her accountant and file such statements by June 30, 1989. In fact, statements were filed with the Ministry on July 12, 1989 by Mr. Grunwald, Chartered Accountant, on behalf of Nova Funding.

Miss Brooks testified that she reviewed the statements filed and contacted Mrs. Novack on July 18, 1989 to inform her that such statements were not audited as required by Section 3 (6a). There followed some correspondence which Mrs. Novack testified she did not receive and, in any event, a Proposal was issued on April

30, 1990 by which time, Mrs. Novack had filed the undertaking not to operate except under the licence of Nationwide.

On June 15, 1990, the Ministry received the audited statement for the fiscal period ending May 31, 1988, but found it defective in that there was no balance sheet or notes to the financial statements, that it was simply a statement of income and expenses.

In her evidence, Mrs. Novack stated that she had neither a Trust account nor assets during the period and, therefore, the statement of income and expenses was all that was available upon which to report.

While the Ministry considered that the audited statement filed was not satisfactory, Mrs. Novack testified that the information given in the statement which she filed in July of 1989, differed not at all from the audited statement provided by Mr. Grunwald. On the basis of that testimony, the Tribunal finds as a fact that the audited statement filed July 12, 1990 was in fact in compliance with the Act. There remains therefore a gap, given the testimony of Mrs. Novack that she was on maternity leave, for the period from June 1, 1989 through to March 1990, when she obtained employment with Nationwide.

According to Mrs. Novack, no activity occurred during that period because it was principally taken up with her maternity leave. Counsel for the Ministry indicated that it would accept an audited statement indicating no operations or an affidavit to that effect from Mrs. Novack.

Of particular interest to the Tribunal was the evidence given by Mrs. Novack's current employer Mr. Mozes, the President of Nationwide, that his auditor is Mr. Grunwald and that he has been a Mortgage Broker for 16 years, and has always filed his statements as required since the 1985 amendment to the Regulations. The Tribunal, therefore, has the evidence of Mrs. Novack that in respect to the first request to file audited financial statements, she consulted Mr. Grunwald and that he made the filing directly with the Registrar, which was acknowledged by Miss Brooks.

Mrs. Novack testified that she thought there had been compliance having relied upon her auditor to so file. In view of the evidence that Mr. Grunwald has acted for Nationwide, the Tribunal views the action of Mrs. Novack, while perhaps somewhat careless, reasonable in dealing with an experienced Chartered Accountant who was, in fact, acting for at least one other Mortgage Broker. Not to renew her registration, therefore, given the circumstances would seem to be harsh. On the other hand, it is

important that Mortgage Brokers comply with the law and carelessness in not complying with the Act and Regulations is, in the view of the Tribunal, not to be condoned, and the Tribunal is of the view that certain restrictions should be imposed upon Mrs. Novack and Nova Funding.

Accordingly, by virtue of the authority vested in it under Section 7 of the Mortgage Brokers Act, the Tribunal directs the Registrar to renew the registration subject to the following terms and conditions:

1. Nova Funding shall pay the appropriate renewal fee due November 18, 1989 and November 18, 1990 in the amount of \$400.00.
2. Nova Funding shall file proper audited statements satisfactory to the Registrar including "Nil" statements if appropriate or if acceptable to the Registrar, an affidavit reporting nil activity, for the fiscal periods ending May 31, 1989 and for the period from June 1, 1989 up to the commencement of employment with Nationwide Investment Funding Inc. in March of 1990.
3. Mrs. Novack continue employment as a Broker with Nationwide Investment Funding Inc. or some other broker registered under the Mortgage Brokers Act for a period of one year from the date of release of this decision pursuant to an undertaking such as that filed with the Registrar on March 19, 1990.
4. Mrs. Novack and Nova Funding file on or before November 18 of each year, a renewal application with the Registrar and comply with all requirements under the Act, including the filing of audited financial statements unless exempted therefrom under her employment undertaking.
5. At such time as Mrs. Novack or Nova Funding commences operations as an independent Mortgage Broker, Mrs. Novack and Nova Funding comply strictly with the filing requirements required from time to time under the Act or its Regulations or any order of the Registrar made pursuant to Regulation 662, Section 3(7) thereof.

OTTAWA-CARLETON MORTGAGE INC.
and DAWN KING

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF MORTGAGE BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
J. BEVERLEY HOWSON, Member
MICHAEL HEWTON, Member

COUNSEL: STEPHEN CAVANAGH, representing the Applicants

EDWARD WREN, representing the Registrar of
Mortgage Brokers

DATE OF
HEARING: 21, 22, 23, 24 January 1991 Ottawa

REASONS FOR DECISION AND ORDER

In accordance with Section 5(1) of the Mortgage Brokers Act, R.S.O. 1980, c.295, an Applicant is entitled to registration or renewal of registration by the Registrar with five exceptions detailed therein.

The Registrar of Mortgage Brokers by a Notice of Proposal to refuse registration dated the 30th day of April 1990, has decided to refuse the application of Ottawa-Carleton Mortgage Inc. ("OCMI") for registration as a mortgage broker on two exceptions under Section 5:

- (c) the applicant is a corporation and,
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty;
 - (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

The information in the Notice of Proposal states that OCMI is an Ontario corporation which Thomas J. May had incorporated on August 24, 1989. Mr. May is a registered mortgagee.

broker who turned over the company on October 10, 1989 to Dawn Alice King as President, sole director and sole shareholder. Dawn King and Grant King had become employees of the company and completed their Notice forms on August 28, 1989 in accordance with Ontario Regulation 662, 3(8); and Mr. May reverted to continuing his own personal registration as a mortgage broker.

Dawn King made a separate application for registration as a mortgage broker on October 10, 1989 and the business was to be carried on under the name of OCMI.

The Registrar's Proposal notes:

- (4) Dawn King has informed the Registrar that one of the employees of the corporate applicant would be Grant King. The applicant has hired Grant King and has been carrying on mortgage brokerage activity under the licence of another licensed broker approximately since September 1989.

Paragraphs 5 to 16 of the Particulars refer to details of the collapse of the mortgage empire of Glen Coulter, of Ottawa whose Coulter Financial Corporation ("CFC") and captive finance acquirer Kiminco Acceptance Co. Ltd. ("Kiminco") collapsed in 1989 with a loss of some eight million dollars invested by some 1,500 persons in various mortgages, mortgage participation agreements and in other financial schemes.

Because of Grant King's involvement with CFC, the Registrar believes that Grant King is not suitable to be employed in the mortgage brokerage business and refuses to grant a mortgage broker licence to Dawn King unless she denies employment to Grant King among other conditions considered in January 1990. The Registrar's conclusions are set out as:

- (18) As a result of the foregoing, in the Registrar's opinion the applicant is not entitled to registration under the Act on the basis that the past conduct of its officers or directors in employing or intending to employ Grant King, affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty, Alternatively, the applicant is carrying on activities that are, or will

be if the applicant is registered in contravention of this Act or the Regulations, if Grant King is in its employ.

Robert Marrs is the Deputy Registrar under the Mortgage Brokers Act since January 8, 1990, and was for ten years earlier an employee with the Ontario Ministry of Industry and Trade. He is familiar with the application by Thomas J. May for the carrying on of a mortgage broker business under the name of OCMI, with the Employee notices which were sent in for Dawn King and for Grant King both dated August 28, 1989 and with the incorporation of OCMI by May on August 24, 1989. He reviewed the applications by Dawn King to be registered as a mortgage broker and to be the sole shareholder and officer/director of OCMI. Her qualifications were set out on the application as:

During 9 years at The Toronto-Dominion Bank 2 years were spent in administration, 1 1/2 years as personal loans/mortgage officer, 2 1/2 years as assistant manager personal banking (deposits, investments, personal loans, mortgages) and 2 1/2 years as assistant manager mortgages.

In addition, she attached a copy of her certificate of qualification for passing the examination of the Ontario Mortgage Broker's Association which is Number 1295, and is dated September 21, 1989.

Marrs noted that Grant King had been President of CFC which collapsed in July 1989. There were concerns about a large brokerage fee which Grant King had received on the financing of a 27-unit condominium. Grant King offered an affidavit dated January 2, 1990 and supported his application to be separately registered as a mortgage broker. The Affidavit noted:

1. I am an employee of Ottawa-Carleton Mortgage Inc. and I have knowledge of the matters to which are hereinafter deposed.
2. At no time have I ever knowingly misrepresented any fact regarding any mortgage placed with Kiminco Acceptance Corporation.

3. At no time did I ever supervise or in any way manage the affairs of Kiminco Acceptance Corporation; rather, I dealt with Kiminco Acceptance Corporation strictly as a broker and on occasion as a borrower.
4. At any time that I borrowed funds from Kiminco either personally or through a company in which I had an interest, I always disclosed my interest to Kiminco.
5. Any funds borrowed by me personally or by a company in which I had an interest, have been repaid in full to Kiminco. Kiminco Acceptance Corporation has never lost any money on any such transaction.
6. This affidavit is made in support of an application by me for registration as a mortgage broker under the Mortgage Brokers Act, and for no improper purpose.

King later withdrew his application to become a mortgage broker. On August 18, 1989 a brief letter had been sent to King by Joyce Brooks, a then Document Review officer in the Mortgage broker office which stated:

Further to your telephone conversation with Mr. Halpert today, your registration is still pending the outcome of the investigations in Ottawa as discussed.

Please note that there is nothing prohibiting you from operating as an employee of another mortgage broker.

We will contact you as soon as the investigation has been completed.

In Marr's opinion, this letter was issued just after the collapse of CFC and before the facts of the whole financial disaster were known. Marrs reviewed a letter which Grant King had

sent to Kenneth Radnoff, Q.C. on May 30, 1989 and which discussed the financing of the Edgecliffe Condominium project. Fees of \$559,060 and of \$215,000 were invoiced on the 27-unit and 14-unit Phase II respectively.

On cross-examination, Marrs repeated that Grant King was President of CFC and perhaps the Manager of the Edgecliffe Project. He acknowledged that all files had been willingly provided as sought and that the Registrar would licence Dawn King if Grant King was not involved in that business carried on as OCMI. Marrs stated that Grant King should not be allowed to work as an employee of any mortgage broker in Ontario and that the Notice of Proposal is equal to Grant King being simply unsuitable, although no action was contemplated against Thomas J. May for hiring Grant King. The size of the brokerage fees in the Edgecliffe matter was a concern and Marrs believed that Grant King had personally received \$275,000.

The Registrar had agreed to licence Dawn King as a mortgage broker if the following Undertaking was completed by her:

UNDERTAKING

To: Ministry of Financial Institutions
Mortgage Brokers Section
7th Floor
555 Yonge Street
Toronto, Ontario
M7A 2H6

Attention: R.K. Marrs, Manager

RE: TERMS AND CONDITIONS UNDER THE MORTGAGE BROKERS ACT
FILED BY OTTAWA-CARLETON MORTGAGE INC.

I, _____ of the City of Nepean, in
the regional municipality of Ottawa-Carleton, hereby
undertake as follows, both personally and on behalf of
OTTAWA-CARLETON MORTGAGE INC.

1. I am the President of Ottawa Carleton
Mortgage Inc.
2. Pursuant to Section 6 of the
Regulations under the Mortgage Brokers Act,
I will provide monthly reconciliations of
the Corporation's trust account no later

than 15 days after the completion of the month under review.

3. The Corporation will not invite investors or any other member of the public to place funds with the Corporation.

4. The Corporation will not syndicate mortgages.

5. With the exception of the Golden Acceptance Mortgage Investment Corporation's fund totalling not more than \$2 million, the Corporation will not administer mortgage portfolios.

6. These conditions will be open for review only after a period of 12 months has elapsed and subject to the Ministry's satisfaction as to the corporation's compliance to the Mortgage Brokers Act.

Dawn King
Ottawa-Carleton Mortgage Inc.

Marrs noted that monthly financial statements, or trust reconciliations would be provided to the Registrar. However, Dawn King never agreed to the exclusion of Grant King from her employ. In the CFC fiasco, more than 20 companies were included with many Kiminco mortgages. The Trustee for the whole project is Thorne Ernst Whinney and two mortgage broker registrant companies are being wound up. Criminal charges were laid against Glen Coulter for fraud and a guilty plea was entered to one count, which had 22 counts rolled into it. On February 15, 1991, Glen Coulter was sentenced to three years in prison. No charges were laid against anyone else, and Glen Coulter was clearly seen as the sole directing mind of the whole empire.

Marrs would have had both Dawn King and Grant King complete Undertakings, but that was not agreed to by his superiors.

Bill Vasilious has been the Registrar of the Mortgage Brokers Act and Assistant Superintendent of Deposit Institutions since September 17, 1990. On July 18, 1989, he was seconded from the Loan and Trust Branch of his Ministry to assist in investigating the CFC collapse. He reviewed many files at Kiminco

including the Mid-Canada Construction Ltd. loan for the Edgecliffe project. His evidence outlined the raising of monies for CFC projects through Kiminco where investors would be paid a rate of 2 or 2 1/2% interest higher than general mortgage market rates and receive a Mortgage Participation agreement showing their shares in a certain mortgage, together with twelve post dated monthly interest cheques. He noted that fees were received by Kiminco as the interest spread between the interest rate on monies borrowed by clients such as Mid-Canada and that paid to the investors. In addition, a substantial fee was usually deducted from the loan proceeds and went to CFC.

In his opinion, Grant King was President of CFC and a senior mortgage broker with CFC. Both CFC and Kiminco were registered mortgage brokers. Some 27 companies in the Glen Coulter empire had their assets frozen and Kiminco investors were not aware that their funds always went to CFC projects.

The Registrar reviewed the Mid-Canada financing and the resulting interest charged on the loan. While investors had their year's cheques and would be cashing them, the property came under power of sale and income was not coming to Kiminco on the project. Investors were moved from one project to another as their investment certificates matured. He believed that the mortgage fee of \$559,060 was divided equally by CFC and Grant King.

In his investigation, he noted further financing went on the strength of certain promissory notes and he found discrepancies in values for land costs, as well as a lack of real security for the individual investors. He could not justify the fees charged from a review of appraisals, legal reporting letters or zoning work done. Since Grant King was involved in the project, the Registrar saw a greater duty for King to have towards the many small investors who could not assess the risks of a project and whose funds were captive for the use of CFC.

Further revelations about this project show that the trust company's mortgage is apparently not a first charge on the property, only one access road is there when there should be two, the project was not enrolled in the Ontario New Home Warranties Plan, various terms and conditions were not met and the solicitor who acted for several parties to the transactions is in the midst of litigation. The Registrar also noted that personal financial statements filed by the borrower/president of Mid-Canada were inaccurate and misleading if not actually false.

On cross-examination, the Registrar was shown a form from the inside cover of the relevant Mid-Canada file at Kiminco which Grant King had just obtained. The Registrar agreed that the form

showed the share of commission going to Grant King to be \$82,500, and not \$275,000.

The Registrar stated that Grant King was not suitable to be a mortgage broker in Ontario or an employee of a mortgage broker in Ontario. No letter outlining this opinion had ever been sent to Grant King nor had the Registrar ever spoken with Grant King, and the Proposal for this hearing had been signed by the former Registrar more than four months before the present Registrar was appointed.

Dawn King married Grant King on August 2, 1986 and they are the parents of two very young children. A graduate of Queen's University in Honours Economics, she joined the Toronto-Dominion Bank and for nine years advanced from one level of responsibility to the next becoming the Assistant-Manager for mortgage lending at the Main Ottawa Branch and approving for area branches larger loans. In her two and one half years with that work, there was a great increase in business and she sought business from Glen Coulter which resulted in the processing of up to ten applications a day from his various companies. While her superiors were wary of Coulter, she had only one default problem in some 400 residential loans.

She informed her manager upon her first date with Grant King, who was a customer of the Branch, and she left the Bank upon her marriage. Her performance appraisals from the Bank showed her to exceed job requirements routinely and on occasion noted exceptional performance matched with increasing salary levels.

On the collapse of the CFC empire, she needed employment and began to work for Thomas J. May along with several other former CFC experienced staff as OCMI was developed. She is the administrator of the office and May co-signs cheques and reviews all files. Grant King is a mortgage consultant, and there are a total of eight persons on staff. She noted that the Registrar of Mortgage Brokers had never contacted their office, nor did any inspection of their activities in the past eighteen months and that his involvement would be welcomed.

She firmly stated that control of all files and procedures follows the strict pattern of her bank training and that Grant King has no influence on any procedures, but must conform to office practice just as anyone else.

On cross-examination, she acknowledged that the Registrar's office knew that she and Grant King had planned to take over OCMI from Thomas J. May who really had allowed his licence to be used to create that company. As soon as she was registered, May

was going to revert to his own personal registration, which he would keep while also acting as a real estate broker. The refusal to allow Grant King to become registered as a mortgage broker and to be involved upset their routine plan.

A major client of OCMI is a mortgage investment corporation which controls the RRSP accounts of many Century 21 real estate agents in Ottawa. Their confidence in Dawn King was shown by her appointment as secretary to the controlling Board and by her administration for a 3/4% fee of their various mortgage files which now amount to some \$5,000,000 value.

In her view, the approach taken by the Registrar in her application is unfair and has led to much stress and great financial cost. The details of the Proposal are incorrect and Grant King did not receive a \$275,000 fee, nor was he an employee of Kiminco. The Glen Coulter operation went on for ten years and on its collapse, no charges were laid against Grant King.

Dawn King noted that her reputation is clear and that no inspection of the OCMI operation was ever done to show evidence of any financial mismanagement or to show that Grant King was in some way a directing mind of OCMI and acted to put the investments of any client at risk.

While the Notice of Proposal refers to both OCMI and Dawn King as "mortgage broker", the Tribunal was informed that the application is really that of Dawn King who can buy or create a limited company and operate under that name with the knowledge of the Registrar. Since she is a qualified person, under Ontario Regulation 662-4(4), the corporation can be registered where all of its directors and officers who are actively engaged in the business have met the examination requirements.

Grant King received his business college education and he spent a year with the Canadian Imperial Bank of Commerce in Ottawa as a loans and mortgage officer. There he met Glen Coulter and joined with him in business in April 1976. He remained as an employee until the collapse of 1989 and was the second in length of service of all the employees of Glen Coulter. He became a Manager in 1983 as two branches and 15 employees developed, but also had some 600 active mortgage files to review. By 1989, he was the Senior Vice-President of Coulter Financial Services Limited, but Glen Coulter as President was the sole decision maker and the only mortgage broker in the whole operation.

Kiminco was a three-person fund-raising captive corporation created by Glen Coulter to ensure a clear flow of investor funds into CFC projects; but Grant King was never an

employee, officer or signing authority at Kiminco, he said.

By 1988, Coulter Financial Services Limited had 16 branches and some 140 employees. Glen Coulter did all advertising, created brochures, made all investment decisions, hired all staff and set all fees for loans of more than \$25,000. Grant King stated that his fee on the Mid-Canada project known as Edgecliffe was 30% of one-half the fee, or \$82,500.

By 1987, Glen Coulter was doing some \$45,000,000 worth of business annually in the Ottawa area, of which Kiminco provided some 10% of funds used. The fees deducted from loan proceeds reflected about one-quarter of the final profits on the project and any final shortfall to complete a project was the concern of the builder or developer. In this case, Glen Coulter had structured a project to find the funds to buy out four properties with buildings on them and allow the development of the project to proceed to the point where a new first mortgage could be obtained from Metropolitan Trust on the developing condominium buildings. Some \$666,000 of Kiminco's investor's monies went into the project, but the source of the monies was not known to Grant King according to his evidence.

As part of his evidence, King provided to the Tribunal copies of various documents which were readily available in the files for the project maintained at the Kiminco office. These included: statements of trust fund dispersal from a solicitor, appraisal reports on market value of the Edgecliffe site, planning letters from the City of Ottawa and invoices for various site services, as well as an outline of the "soft costs" for the commencement of the entire project which amounted to \$666,000. When Grant King was asked by the solicitor involved if the Metropolitan Trust mortgage was to be a second, he contacted an officer at that company to express his surprise that such a question would be asked. He understood that there should be enough funds from the first and second advance under the new first mortgage to take care of any outstanding obligations and was surprised to see certain fees paid to other persons for activities that did not relate to the Edgecliffe project. It was at this time that he wrote the letter to Mr. Radnoff to explain the whole situation and to assist in the proper and correct completion of the various obligations under this project.

By the end of 1988, Grant King said that he was no longer involved in the management activities but only continued as a mortgage consultant in order to spend time with his young family. His understanding was that the results of activity following the letter to Mr. Radnoff saw the commencement of activities to recover substantial funds from the lawyer who had been representing Glen

Coulter in the Edgecliffe transactions. Grant King stated that no investor or other person is suing or making any claim against him for any of his activities involved with Coulter Financial Corporation. He met with the investigators assigned with respect to criminal activities and has heard nothing further from their meetings until his own application to be registered as a mortgage broker was refused.

He wrote the examination required in May 1989 as did many others and expected that licensing would be routine because of his sixteen years experience in the mortgage brokerage business. He stated that many former senior employees of CFC were granted registration as mortgage brokers on successful completion of the examination, but that approval with respect to his application was refused.

He knew of Thomas J. May who had been with the Canadian Imperial Bank of Commerce for some 25 years and had then obtained both a real estate and a mortgage broker registration. He sought employment with Mr. May and reviewed his whole situation in the presence of Mr. May's lawyer. After that review, both he and his wife Dawn King began to work with Mr. May under the OCMI business operation. He noted that all the evidence of appraisals and other correspondence for the Edgecliffe project were readily available in the files of Kiminco and could have been reviewed by the Registrar or his staff to resolve many of the errors and concerns raised in the Notice of Proposal with respect to his own activities at CFC.

On cross-examination, Grant King acknowledged that he was a Senior Vice-President and was not at any time the President of CFC. His 1988 income was in the \$200,000 plus range and while he knew of the operations of Kiminco, he had nothing to do with that corporation. He stated that he was not involved with any of the investor's accounts and did not know how the trust account was balanced or whether funds were moved from one account to another at Kiminco in the ordinary work done by that company.

A review of trust records and of the statement of the trust funds dispersal by solicitors showed fees from the first advance going to CFC in the amount of \$559,060. Grant King acknowledged that these fees were effectively one-half of the profit projections for the entire project, but stated that this was not a risk for the investors because the builder could not have started the entire project without the financial backing of CFC. In his view, CFC or Kiminco would have risk in this project only if the builder had overruns of costs. Since all the soft costs had been paid, the building would have been completed and the first mortgagee would be in control of the project.

In his evidence, Thomas J. May reviewed his lengthy business experience with the Canadian Imperial Bank of Commerce and other business operations since he left the bank in 1975. He confirmed the meeting with Grant King and the review of Grant King's involvement with CFC which was completed in the presence of Mr. May's own lawyer. May is unaware of any reason why Grant King should not be hired as an employee of a mortgage brokerage and has found no problem with Grant King's work and the various files that May has reviewed at OCMI. He stated that no one from the Registrar's office has ever told him that Grant King was unacceptable, nor had there been any inquiries into the operation of OCMI by the Registrar or members of his staff.

As a final witness on behalf of the Applicant, Kathy Pun reviewed her work with Kiminco since June 18, 1978 as a bookkeeper. She is now employed with the Trustee for Kiminco and continues in the ongoing administration of that business. She was the only employee of Glen Coulter until Grant King was hired. She and two others were the staff of Kiminco where Glen Coulter was President, approved mortgages, sent instructions and reported to clients and where he continued to approve mortgages greater than \$100,000 in value up to 1989. She noted that the CFC would not have anything to do with Kiminco after a file had been referred and that the fees were decided upon and attended to directly upon the instructions of Glen Coulter. A common practice was to have fees deducted at the beginning from the first draw of the mortgage. She noted that there had been several visits before 1983 by inspection staff of the Registrar's office and further visits in 1986 and briefly in 1988, and that the fee practice for the operations of Kiminco remained the same through its business history.

She further stated that Grant King was effectively the office manager for both CFC and for Kiminco in the early 1980's and that he would approve certain files if Glen Coulter was not in the office, but he was not otherwise involved in any of the ongoing Kiminco decisions. She acknowledged that with respect to trust conflict conciliations, any shortfall would be made up by transfer from the general fund on the direction of Glen Coulter, and that Kiminco's general source of funds was from investors and from profits made from the fee charged with respect to mortgage applications.

In reply evidence, Bill Vasilicou reviewed the various Ministry visits to CFC and the difficulty which Ministry inspectors faced in determining the accuracy of various files. Since the receiver took two months to try and sort out these various files, he stated that the proper reconciliations were not possible due to the various post dated cheques that were outstanding. By July of

1989, an entire review of the whole CFC operations saw a freezing of more than 20 companies and their assets, together with Glen Coulter's bank account and personal residence. He stated that there was no evidence that Grant King was involved in any of Kiminco transactions and that he was uncertain as to King's involvement with CFC and its detailed transactions.

A final witness on behalf of the Applicants was Hugh Fox, the Manager of the main branch of the Toronto-Dominion Bank in Ottawa and an Assistant General Manager of the Bank since 1981. He reviewed the appraisal reports of Dawn King and praised her for the growth and improvement of the mortgage financing area of the operations of the branch and the region.

In summary argument before the Tribunal, counsel for the Registrar sought to have the Tribunal decide if there was some conduct by Grant King that his work at CFC should give reason for concern in his employment with any mortgage brokerage in Ontario. Counsel suggested that a higher standard of care should exist for Grant King with respect to his knowledge of the operations of Kiminco and that a greater disclosure to investors by Glen Coulter was not encouraged by his employee Grant King. He further suggested that there was a lack of preliminary underwriting preparation, particularly for the Edgecliffe deal and that Grant King placed too much trust in Glen Coulter without looking at business operations in detail, where, as Senior Vice-President of CFC, he should have been aware of ongoing problems. Counsel characterized the approach of Grant King through his later years with CFC as a "see no evil" approach and his responsibility should have been of a higher quality.

In reply, counsel for the Applicant repeated his initial comments made at the beginning of the hearing in that nothing had been proven by the Registrar with respect to Grant King and that there was no past conduct or present activities of Dawn King which should cause her application for registration as a mortgage broker to be rejected. He recited Dawn King's impeccable qualifications and her activities at OCMI since mid-1989 without any criticism or investigation made by the Registrar. He noted that for some eighteen months, both Dawn King and Grant King were employees at OCMI without any comment made by the Registrar. He noted the co-operation made by Dawn King with the Registrar's office, and her two visits, together with her counsel to Toronto to review the application for registration. He further noted that the Registrar believes that Grant King should not work in the mortgage broker industry, but has never told him directly nor has he informed Thomas May, Dawn King or himself as to any reasons for this attitude on behalf of the Registrar.

While lengthy evidence has been brought before the Tribunal with respect to the collapse of Glen Coulter's financial empire, counsel stated that none of the matters complained about had anything to do directly with Grant King and that the failure to control or supervise the CFC operations was that of the Ministry of Consumer and Commercial Relations which watched as disaster touched investors, business concerns and the Government of Ontario in this fiasco. In his view, previous Registrars and their staff were not able to penetrate the details of the Glen Coulter empire and the present Registrar could not expect that Grant King would have known the details of the Kiminco operation to any greater degree.

Counsel further advanced the view that Grant King has been condemned without any appropriate confirmation of the facts in that the two interviews with the investigator concerning criminal charges were not reported in detail to the Registrar and that the Registrar's review of the Edgecliffe file was a cursory one with many items available readily in the file even though opinion evidence was given as to their unavailability.

Finally, counsel commented that if the Registrar has certain concerns about Grant King, they have apparently not been sufficient to cause any investigation of the ongoing operations of OCMI during the eighteen months that that mortgage brokerage business has been in operation.

The Registrar of Mortgage Brokers has expressed the opinion that Grant King is an unsuitable person to have as an employee in the mortgage brokerage business in Ontario or as a registered mortgage broker. In order to sustain that opinion, this Tribunal believes that the Registrar should have been able to provide clear evidence and answers to the following questions:

1. Was Grant King a directing mind, signing officer or shareholder in Coulter Financial Corporation?
2. Was Grant King a directing mind, signing officer or shareholder in Kiminco Acceptance Company Limited?
3. Was Grant King a person charged or convicted under the Criminal Code of Canada with fraud or other charges with respect to the collapse of CFC and Kiminco?
4. Was Grant King an officer, director, or shareholder of any other mortgage financing or

investment corporation partnership or group linked in any way to the activities of CFC or Glen Coulter?

5. Was Grant King a person who has any outstanding judgments against him as shown by a Sheriff's Certificate or by any court orders?
6. Was Grant King a person now or previously in personal or corporate bankruptcy?
7. Was Grant King a person against whom angry investors have begun by complaint or legal action any claims as to his involvement with their losses by his personal advice or activities in the placing of investment loans or in the improper dealing with proceeds thereof?
8. Was Grant King a person against whom any complaints were made as to misrepresentation or lying with respect to any such investments?
9. Was Grant King a person against whom any complaints have been made in the conduct of his mortgage business operation over the years?
10. Was Grant King as an employee of OCMI since May 1988, involved in any complaint by investors, other mortgage brokers or borrowers with respect to the activities of that corporation?
11. Has any investigation been made by the Registrar's office with respect to Grant King's activities at OCMI and have any problems been found in the last eighteen months of that business operation?
12. Finally, is Grant King a directing mind of OCMI so that he would have influence over Dawn King to do any improper activities or put any investor's funds at risk because of an ongoing pattern of action which had earlier been developed while he was an employee at Coulter Financial Services?

The Tribunal is of the opinion that none of the above noted questions have been answered by evidence brought forward on behalf of the Registrar and that there is no basis for the opinion

that Grant King should not be an employee of a mortgage broker office within Ontario.

It is clear to the Tribunal that Dawn King is well qualified to be registered as a mortgage broker in Ontario with no terms or conditions of any kind attached to that registration and that the carrying on of the mortgage brokerage business under the name of Ottawa-Carleton Mortgage Inc. is both legitimate and appropriate.

Accordingly, pursuant to Section 6(4) of the Mortgage Brokers Act, R.S.O. 1980, c. 295 as amended, the Tribunal orders the Registrar to refrain from carrying out his Proposal and to register Dawn Alice King as a mortgage broker carrying on business under the name of Ottawa-Carleton Mortgage Inc. and to accept Grant King as an employee of that brokerage in accordance with Ontario Regulation 662, section 3(8).

PERMA FINANCIAL SERVICES CORPORATION

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF MORTGAGE BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
MICHAEL HEWTON, Member

APPEARANCES: GUISEPPE NATALE, its agent

EDWARD J. WREN, representing the Registrar
under the Mortgage Brokers Act

DATE OF HEARING: 4 October 1991 Toronto

REASONS FOR DECISION AND ORDER

This was an application under the Mortgage Brokers Act to refuse to grant the registration as a mortgage broker of Perma Financial Services Corporation. The facts indicate that 627337 Ontario Ltd. operating as Perma Financial Services, the sole director and shareholder of whom was Mr. Giuseppe Natale, was registered as a mortgage broker from April 9, 1987 to April 9, 1989 when the registration expired. The facts indicate that the Registrar under the Mortgage Brokers Act instituted an investigation of the operation of the numbered company on April 10, 1989 and by letter dated April 17, 1989, the Registrar's office informed the numbered company of certain improprieties but went on to state, "With regard to the mortgage files which were reviewed, they were found to be of acceptable quality, but more care is needed."

The letter further directed the Company to respond within 30 days confirming that the matters identified had been addressed. It also appeared that a new corporation under the name of Perma Financial Services Corporation was incorporated on May 8, 1989 and that an application purporting to be a renewal under the Mortgage Brokers Act for Perma Financial Services Corporation was filed on June 1, 1989. The Registrar in his Proposal contended that the application for renewal should have been in the name of 627337 Ontario Inc. carrying on business as Perma Financial Services and

that, therefore, the application of Perma Financial Services Corporation was not, in fact, a renewal but a new application for registration. It is to be noted that the principal shareholder and director of the new corporation was Guiseppe Natale, identical to that of the previous numbered company.

From the evidence, it appeared that there were a number of complaints against Angelo Natale, one of the consultants with the company, but the Tribunal is not totally satisfied that these complaints were fully founded and, in any event, the Proposal of the Registrar was based on non-compliance with the Act and in particular, operation by Perma Financial Services Corporation as a mortgage broker prior to its being registered.

There appears to have been some confusion as to the continuation of the mortgage broker operation conducted by Guiseppe Natale through his corporations and, in fact, the Ministry wrote again on November 20, 1989, requesting further information for clarification of the registration of Perma Financial Services Corporation. Further correspondence was sent to the company on December 1, 1989 and January 29, 1990. On January 1, 1990, a letter was sent to the Corporation requesting financial statements for the numbered company carrying on business as Perma Financial Services. A further letter in February was sent by the Registrar indicating that a Proposal might issue not to register Perma Financial Services Corporation.

The Registrar issued his Proposal not to register Perma Financial Services Corporation on October 16, 1990. Subsequently, charges were laid against Guiseppe Natale and Perma Financial Services Corporation of contravening Section 4(1) of the Mortgage Brokers Act by operating without being registered. These charges resulted in a conviction on September 10, 1991 of both Guiseppe Natale and Perma Financial Services Corporation and a fine of \$1,000 was levied against Guiseppe Natale and a fine of \$2,000 against the Corporation. Both were given 90 days to pay.

On the evidence as presented to the Tribunal, it appears that a substantially long time occurred between the investigation by the Registrar's office on April 10, 1989 until action took place by issuing the Proposal in October 1990. During that time, it appears that there was correspondence and perhaps conversations between the Registrar's office and the Corporation. While counsel for the Registrar urged the Tribunal to uphold the Registrar's Proposal not to register Perma Financial Services Corporation, counsel for the Registrar also suggested that in the alternative, there be a suspension of the registration and/or terms imposed upon the Applicant for registration.

Without making light of the fact that Perma Financial Services Corporation has not complied with the provisions of the Mortgage Brokers Act, in assessing the Registrar's report of April 17, 1989 directed to the Corporation, 627337 Ontario Inc., it appears the Registrar considered the operations of the corporation sloppy, but not necessarily deliberately in disregard of the Act. Furthermore, the Registrar's office has obtained a conviction amounting to a total of \$3,000 in fines against the new corporation and its principal officer and director which in the view of the Tribunal will certainly impress upon the Applicant the necessity for compliance in the future with the Act. The Tribunal is of the view that a further opportunity should be granted to the Applicant Perma Financial Services Corporation to demonstrate that it has learned its lesson and will fully comply with the Act and any directions given by the Registrar's office. It is the view, therefore, of this Tribunal that registration should be granted at this time but subject to some very specific terms and conditions.

Therefore, pursuant to the authority vested in the Tribunal under Section 7(4) of the Mortgage Brokers Act, the Tribunal directs the Registrar not to carry out his Proposal under the Act and to grant registration to Perma Financial Services Corporation as a mortgage broker at this time subject to the following terms and conditions provided that if any one of the said terms is not complied with, the Registrar is directed forthwith to carry out his Proposal. The terms to which this Order is subject are as follows:

1. Within 60 days from the date of issue of this Order or such extended time as may be granted by the Registrar in his sole discretion, Perma Financial Services Corporation cause to be filed with the Registrar audited financial statements of 627337 Ontario Inc. in the form required to be filed pursuant to clause 3(6)(a) of Regulation 662 of the Mortgage Brokers Act.
2. Within the same period of time, file audited financial statements for Perma Financial Services Corporation with the Registrar pursuant to clause 3(6)(a) of Regulation 662 of the Act.

3. Perma Financial Services Corporation and Giuseppe Natale pay the fines imposed upon them within the time stipulated by the Court or comply with any final order of any superior Court imposed by way of appeal of the said decision.

Provided that the registration of Perma Financial Services Corporation is continued pursuant to the foregoing terms and conditions, and so long as the registration of Perma Financial Services Corporation continues, the registration of Perma Financial Services Corporation shall be subject to the following terms and conditions:

1. It shall maintain a trust account properly designated and pay into such account all monies payable to Perma Financial Services Corporation and only pay out such amounts from the trust account in accordance with written directions of clients or upon fees having been earned.
2. It shall maintain all records as required under the Mortgage Brokers Act and regulations.
3. In particular, it shall notify the Registrar of the employment of all consultants promptly in accordance with the terms of the Act and regulations.

DAVY BROWN AUTO SALES,
MICHAEL C. BROWN AND
PAUL A. DAVY

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE THE REGISTRATIONS

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
GORDON R. DRYDEN, Vice-Chairman as Member
J.T. HOGAN, Member

COUNSEL: MICHAEL C. BROWN, appearing on his own behalf,
Davy Brown Auto Sales and Paul A. Davy

JANE WEARY, representing the Registrar of
Motor Vehicle Dealers and Salesmen

DATE OF
HEARING: 24 January 1991

Toronto

REASONS FOR DECISION AND ORDER

This is an application by the Registrar under the Motor Vehicle Dealers Act to revoke the registration of the registrant which is Davy Brown Auto Sales and to revoke the registration of the salesmen Paul A. Davy and Michael C. Brown. The reason given in the Notice of Proposal by the Registrar is that the registrant and the salesmen have been carrying on the operation of the dealership in contravention of the Act and the Regulations.

In regard to the evidence that has been put forward, it is clear by the admission of Mr. Brown on behalf of the registrant and the salesmen, that in fact under the Regulations, Section 13(3) which provides that, as a condition as a motor vehicle dealer, the motor vehicle dealer operates from premises located in Ontario which are approved by the Registrar, the dealer has an office for the conduct of business at each premises and the dealer has erected on such premises a sign that is clearly visible to the public and identifies the motor vehicle dealer's registered name, in this particular case, none of those conditions of registration have been met by this particular registrant.

The evidence of Ms. Linda Langston has been that she gave them a substantial opportunity to comply with this provision of the Regulations and that, in fact, even as recently as January of this year, compliance has not been made. Under the circumstances,

therefore, pursuant to Section 6(1)(d) of the Act, the Tribunal finds as a fact that the registrant Davy Brown Auto Sales has been operating in contravention of the Act.

With respect to the two salesmen, the Tribunal is of the view that it must look at the Notice of Further Particulars. In respect to Paul Davy, paragraph 5 of the Further Particulars indicates that Paul Davy in his application dated September 24, 1989, failed to reveal the fact that he had been convicted of extortion on October 13, 1977. In view of the fact that Mr. Davy has not appeared before this Tribunal, it is the view of the Tribunal that a *prima facie* case with respect to this response has, in fact, been made and therefore, it is appropriate that his licence as a salesman under the Act be revoked.

With respect to the Applicant Michael C. Brown, the Further Particulars with respect to this Applicant are contained in paragraph 7 and are based upon the fact that a judgement was rendered against Michael C. Brown. In fact, the evidence clearly discloses that the judgement on file in the City of Hamilton in the Judicial District of Hamilton-Wentworth is against a defendant named David Michael Brown and not against Michael C. Brown. The Tribunal was impressed with the forthright evidence of Mr. Brown that he has not had any dealings with General Motors Acceptance Corporation and, in fact, has no judgements against him. For this reason, the Proposal to withdraw or revoke the registration of Mr. Brown cannot be upheld in respect to this particular item.

There is a matter, however, that has to be considered with respect to Mr. Brown concerning the application that was filed on behalf of the registrant. Mr. Brown signed that application as did Mr. Davy. He, therefore, must be bound by the contents of that application, and in that application there was indicated, that there were neither judgements nor convictions against the registrant and if one looks at the covering page of the application, "applicant" is identified as including in the case of a partnership, each of the partners.

In his evidence before the Tribunal, however, Mr. Brown indicated that he was aware of this conviction against Mr. Davy. He indicated that it was some time prior and, in fact, the evidence disclosed that the conviction was issued in 1977; the application for registration of both the applicant and the salesmen was in 1990. A space of twelve years. Also if you look at the application of Mr. Davy, it will be seen that at the time of the conviction, he was twenty-one years of age, so that we have before the Tribunal the evidence of a conviction when Mr. Davy was twenty-one and a twelve year period when there has been no indication of any other offense.

This Tribunal in the past has frequently indicated that it is appropriate not to forever damn an individual who may have gone astray, particularly in a case where it was an offense committed when that individual was of tender years and certainly where a younger person has demonstrated certain reformation since. The Tribunal has also indicated that if a pardon has been granted, or there has been long standing clear evidence of reformation, that that should be considered in respect to an individual. In his evidence before the Tribunal, Mr. Brown indicated that he was aware of Mr. Davy's conviction. He indicated that he thought that a major period of time had passed, that Mr. Davy had indicated to him that he had intended to apply or was applying for a Queen's Pardon.

It seems to this Tribunal, therefore, that in the case of Mr. Brown there has been no evidence of his dishonesty or his intent to not provide full disclosure, and there is no reasonable evidence that Mr. Brown lacks honesty and integrity. There is the question of the sale of the two vehicles at a time when the registrant was not in compliance, but in the view of this Tribunal that is not in respect of Mr. Brown, a question of lacking honesty and integrity. It may indicate non-compliance with the Regulations, but not sufficient in the view of the Tribunal to warrant the revocation of his salesman's licence, this being a blot upon his record for any future application that he might wish to make under this Act or any other Act covered under the Ministry of Consumer and Commercial Relations.

There is one other point that the Tribunal wishes to make and that is with regard to the evidence of Mr. Brown with respect to the operation of the registrant. He clearly gave testimony to this Tribunal that the registrant lacked financial resources to carry on its operation and while this has not been made a specific basis for the Proposal of the Registrar, it is an extremely important part of a regulated industry that there be substantial or reasonable financial capability of carrying on the business in addition to compliance with the Act and its Regulations. So for that reason as well, the registration of the registrant in the view of this Tribunal should be revoked.

The Tribunal appreciates the position and honesty of Mr. Brown having observed him in the witness box in his presentation to this Tribunal and we, therefore, are of the view that it may be perhaps naivety on his part, it may be that he did not fully understand what was required, it may be that he relied upon his friend Mr. Davy, who he has indicated, is a manager in a responsible position and who should, perhaps, have been able to deal with the issues which have been raised in the Proposal.

The evidence of Ms. Langston has been that her contact has always been with Mr. Davy so that in the view of this Tribunal, it is appropriate to confirm the Proposal which the Registrar has put forward with respect to Paul A. Davy and Davy Brown Auto Sales, but in the case of Mr. Brown, the Tribunal is of the view that he, because of his presence here and the evidence that he has given, there is a reasonable probability that he, if he did wish to enter or continue in this field, or as stated in any other commercial regulated industry, his licence should not be revoked.

The effect of this decision, however, means that Mr. Brown will not be able to act as a registered salesman or as a salesman under this Act until such time as he is properly registered as an employee of a registered dealer under the Motor Vehicle Dealers Act.

On the basis of the considerations that have been made, the Tribunal by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act directs the Registrar to carry out his Proposal with respect to Davy Brown Auto Sales and in respect to Paul Davy personally and not to carry out his Proposal with respect to Michael C. Brown.

HAROLD HILLIKER

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES
OF THE MOTOR VEHICLE DEALERS' COMPENSATION FUND

FOR REFUND OF MONIES

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
J.T. HOGAN, Member

APPEARANCES:

L.A. BANACK, representing the Board of Trustees
of the Motor Vehicle Dealers' Compensation Fund

No one appearing for the Applicant

DATE OF
HEARING: 27 November 1991

Toronto

REASONS FOR DECISION AND ORDER

In this matter, Harold Hilliker appeals to this Tribunal from the decision of the Board of Trustees of the Motor Vehicle Dealers' Compensation Fund allowing him the sum of \$1,500 on his total claim of \$9,270.99 against the Fund for a defective vehicle purchased from Town & Country Auto Sales.

Although a Statement of Facts was directed to Mr. Hilliker's solicitors on October 24, 1991, and a final statement on November 7, 1991 by counsel for the Registrar, it does not appear that any response was received and Mr. Hilliker was not represented by them at this hearing nor did he appear personally.

The matter, however, proceeded and the Statement of Facts which does not appear to be in dispute sets out the following circumstances:

1. The Applicant, through the efforts of his daughter, Sharon Monk purchased a 1977 Cadillac Seville from Town & Country Auto Sales, a registered motor vehicle dealer within the meaning of the Motor Vehicle Dealers Act.
2. On May 16, 1988, Mrs. Monk and her husband were permitted an opportunity to drive the vehicle to Mr. Hilliker for his inspection

and approval.

3. The Applicant provided a deposit cheque signed by Mrs. Monk, on account of the purchase in the amount of \$500.00 dated May 16, 1988.
4. The Applicant's daughter, Mrs. Monk, was told on May 16, 1988, having paid the initial deposit, that the vehicle could be delivered as soon as it was certified.
5. After an initial inquiry by Mrs. Monk on or about May 20, 1988, when she was told that the car was not ready, the dealer's representative telephoned Mrs. Monk on May 25, 1988 instructing that she could come and pick up the car.
6. A Safety Standards Certificate was issued with respect to the vehicle by Inter-City Servicing in London, Ontario on May 18, 1988.
7. Mr. and Mrs. Monk attended at the dealer at approximately 11:00 p.m. on May 25, 1988, to pick up the vehicle when a visual inspection disclosed that a door button was missing and one back door would not open, as a result of which, the dealer's representative advised that a door lock had been ordered and that the other button would be fixed.
8. The Applicant paid the balance of the amount due of \$2,640.00 net of a trade in of \$100.00, by further cheque signed by Mrs. Monk, dated May 25, 1988 on which date, ownership of the vehicle was transferred to Mr. Monk.
9. The Town & Country Auto Sales receipt confirms that the motor vehicle was certified and that the purchase price was paid in full.
10. Between May 25, 1988 and June 8, 1988, Mr. and Mrs. Monk experienced various problems with the vehicle, and concluded that it

had not been properly certified at the time of sale, notwithstanding the notation on the sales receipt or the certificate of Inter-City Servicing.

11. On or about June 8, 1988, Mrs. Monk secured a safety inspection report from Dan's Sunoco in London, Ontario which concluded that the cost of performing necessary repair work and issuing a safety certificate would be \$1,000.00 to \$1,500.00.
12. On June 15, 1988, a representative from the Ministry of Transportation and Communications attended at Dan's Sunoco and performed an inspection of the vehicle.
13. The Applicant, by his daughter, Mrs. Monk, was given the following alternatives by the representative of Town & Country Auto Sales:
 - a) The motor vehicle dealer offered to refund \$500.00 so that the Applicant could have the vehicle certified himself; or
 - b) The Applicant could pay the motor vehicle dealer an additional sum of \$500.00 and he would perform the work and have the vehicle certified at the garage of Mrs. Monk's choice; or
 - c) The Applicant could have the remedial work performed and the vehicle certified at a cost of between \$1,000.00 and \$1,500.00 as quoted by Dan's Sunoco.
14. The Applicant did not pursue any of the three alternatives noted but placed the vehicle in storage and initiated an action on December 9, 1988 in the District Court of Ontario against Willis Mahood and George Mahood, carrying on business as Town & Country Auto Sales.
15. The Applicant secured a Judgment dated September 6, 1989 against the said

Defendants, which rescinded the contract for the purchase of the vehicle and awarded damages in his favour for the amount paid, costs of examination and storage, towing charges and gasoline, annual insurance charges, punitive damages, plus interest, all totalling \$6,020.79 and costs on a solicitor and client basis.

16. The vehicle remains in the possession of and registered to the Applicant, Harold Hilliker, notwithstanding the said Judgment.
17. The claim of the Applicant was considered by the Board of Trustees of the Motor Vehicle Dealers Compensation Fund on February 7, 1990, at which time, of the Applicant's total claim in the amount of \$9,270.99, it was determined that:

The claim is found to be eligible because of the judgment and the claimant is to be paid \$1,500.00. This figure is determined as the amount it would have cost to certify the vehicle and put the claimant into the position she had bargained for. Mrs. Monk is to retain the vehicle and no legal costs are to be allowed as they were avoidable had she mitigated her losses by having the vehicle certified. An assignment of judgement to the Fund to the extent of the amount paid is also required.

18. By letter dated March 13, 1990, the above-mentioned decision was forwarded to the Applicant and his counsel, together with a cheque in the amount of \$1,500.00 on account of the decision.
19. By letter dated March 21, 1990, the Applicant by his solicitor, returned the \$1,500 cheque.
20. On March 19, 1990, the Applicant appealed the said decision.

The Applicant's claim is based largely on the Judgment and interest as follows:

Cost of vehicle	\$3,240.00
Interest @ 13%	
May 25, 1988 to September 13, 1989	539.35
Examination and storage	512.40
Towing and gas	110.00
Insurance and interest	1,119.04
Punitive damages	<u>500.00</u>
Total Judgment	<u>6,020.79</u>
Legal costs	2,920.92
Interest September 18 to December 11, 1989 @ 14%	<u>329.28</u>
Total claimed	<u>\$9,270.99</u>

Dealing with the claim for \$3,240.00 representing the cost of the vehicle, we might point out that Hilliker retained it and has, therefore, that benefit which this Tribunal cannot award him. Were he to have returned the vehicle or never to have received it, we could entertain this claim. We, therefore, disallow it.

The claim for interest is barred by section 12(10)(b) of Regulation 665 of the Motor Vehicle Dealers Act and accordingly must fail.

The substantial claim for costs in the sum of \$2,920.92 could have been considered if the appellant had produced evidence, these costs were taxed. We have, however, nothing before us to indicate a taxation and, therefore, pursuant to section 12(10)(c) of Regulation 665 of the Act, this also must fail.

The remaining claims arise out of the appellant's retention of the vehicle and refusal to accept one of the three choices offered him to settle the matter. They were:

- a) The motor vehicle dealer offered to refund \$500.00 so that the Applicant could have the vehicle certified himself; or
- b) The Applicant could pay the motor vehicle dealer an additional sum of \$500.00 and he would perform the work and have the vehicle certified at the garage of Mrs. Monk's choice; or

c) The Applicant could have the remedial work performed and the vehicle certified at a cost of between \$1,000.00 and \$1,500.00 as quoted by Dan's Sunoco.

The appellant chose to ignore these Proposals and as an alternative took proceedings against the dealers.

It is clear from the evidence that Hilliker retained the vehicle. It is also clear that it could have been certified for a maximum cost of \$1,500.00 placing him in his original position with a vehicle as good as he thought he had purchased. The award of \$1,500.00 settlement by the Board of Trustees is, in our view, completely adequate as compensation for any damages incurred by the appellant. He clearly made no attempt to mitigate his damages leaving us no alternative, but to uphold the award of the Board of Trustees of the Compensation Fund.

LEILA LEMON

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES
OF THE MOTOR VEHICLE DEALERS' COMPENSATION FUND

FOR REFUND OF MONIES

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
MARY G. CRITELLI, Vice-Chairman as Member
J.T. HOGAN, Member

APPEARANCES:

R.K. McAVOY, representing the Applicant

LARRY BANACK, representing the Board of Trustees
of the Motor Vehicle Dealers' Compensation Fund

DATE OF

HEARING: 24 September 1991

Toronto

REASONS FOR DECISION AND ORDER

We have before us today a claim from Leila Faye Lemon with respect to a decision reached by the Board of Trustees of the Motor Vehicle Dealers Compensation Fund.

The Statement of Facts is agreed to and in my written Reasons for the decision, we will review the various points that are set out in those particular paragraphs 1 to 21 of the Agreed Statement of Facts.

Until approximately May, 1989, the Applicant was the owner of a 1988 Chrysler Daytona Z against which the Toronto-Dominion Bank, Owen Sound Branch held a lien of \$12,963.01.

On May 20, 1989, the Applicant attended at Ontario Chrysler (1977) Ltd. ("the Dealer") and entered into a written agreement to purchase a used 1989 Plymouth Colt 200, with a purchase price of \$18,450.00 ("the new vehicle") with respect to which she was allowed a trade-in allowance plus discount on account of her Chrysler Daytona Z in the amount of \$12,950.00 ("the trade-in vehicle").

The purchase of the new vehicle was financed through Chrysler Credit Canada Ltd. Upon the sale, the Dealer

and/or Chrysler Credit Canada Ltd. were to deliver to the Toronto-Dominion Bank, Owen Sound Branch the net amount of the lien disclosed on the purchase agreement.

The Applicant delivered her trade-in vehicle, as required, understanding that the lien in favour of the Toronto-Dominion Bank, Owen Sound, was to be discharged through the proceeds of her new credit arrangements.

On May 23, 1989, Coopers & Lybrand Limited were appointed Receiver and Manager of the Dealer.

The lien in favour of the Toronto-Dominion Bank was not discharged and the Applicant remained responsible therefor.

In September, 1989, Chrysler Credit Canada Ltd. offered as a matter of customer relations to pay to the Toronto-Dominion Bank the balance of the \$10,000.00 of proceeds received for the sale of the Applicant's trade-in vehicle, after deducting \$546.59 for the balance owing on the purchase of the new vehicle.

On October 12, 1989, the Applicant signed a Release and Direction to Chrysler Credit Ltd. and Coopers & Lybrand Limited directing payment of the sum of \$9,453.41 to the Toronto-Dominion Bank and releasing all claims against Chrysler Credit Canada Ltd. and Coopers & Lybrand Limited.

In consideration of the receipt of the payment of \$9,453.41, the Toronto-Dominion Bank signed a Release releasing all future claims as against Chrysler Credit Canada Ltd.

The Applicant remained indebted to the Toronto-Dominion Bank for the balance outstanding on the lien with respect to the trade-in vehicle in the amount of \$3,509.60.

In October, 1989, the Applicant delivered by her solicitor, an Application for claim pursuant to the Motor Vehicle Dealers Act.

By letter dated November 17, 1989, from the Motor Vehicle Dealers Compensation Fund, the Applicant's solicitor was advised that the Application for claim was being returned because there was no evidence supporting a claim in bankruptcy and that the amount of the claim was incorrect.

By letter dated December 19, 1989, the Applicant, by her solicitor, reiterated the basis for the claim, advising that inquiry had been made of Coopers & Lybrand Limited requesting forms to make a claim under the Bankruptcy of Ontario Chrysler.

By letter dated December 13, 1989, Coopers & Lybrand Limited advised the Applicant's solicitor that:

"We advise that we were appointed Receiver and Manager of Ontario Chrysler on May 23, 1989. To the best of our knowledge, Ontario Chrysler is not bankrupt."

By letter dated April 12, 1990, the Applicant, by her solicitor, resubmitted the Application for Claim advising that:

"I have studied the Motor Vehicle Dealers Act and in spite of the legislation, I am asking you to treat Mrs. Lemon in a fair way."

By letter dated August 2, 1990, the Compensation Fund Administrator wrote to Coopers & Lybrand requesting proof from Coopers & Lybrand Limited of allowance of the claim in bankruptcy of the Dealer.

By letter dated September 12, 1990, Coopers & Lybrand Limited wrote to the Compensation Fund Administrator advising that:

"We further advise that Ontario Chrysler is not bankrupt, therefore, a claim under the bankruptcy act is not appropriate."

The claim of the Applicant was considered by the Board of Trustees of the Motor Vehicle Dealers Compensation Fund on September 12, 1990.

The Board of Trustees decided to:

"There is no provision in the legislation to pay for Mrs. Lemon's claim on the basis it was submitted ..." and to

"Reject the claim due to the fact that Ontario Chrysler (1977) Ltd. is in receivership and is not bankrupt."

The Applicant was advised that an alternative to asserting a claim arising from a bankruptcy is to pursue a judgment which if remained satisfied, could result in payment by the compensation Fund or, alternatively, the decision could be appealed to the Commercial Registration Appeal Tribunal. (Note: the word "satisfied" should be "unsatisfied")

On October 15, 1990, the Applicant appealed the said decision.

We are indeed sympathetic to the difficulty in which Mrs. Lemon finds herself, but we are constrained by the Regulation to find that this claim has to be part of one of the five requirements for the Trustees of the Fund to pay out money. If insolvency was included in the third requirement, this claim could well have been attended to, and my colleagues and I note that in the fourth requirement, insolvency does appear. Clearly it would be most helpful to have the regulation changed so that insolvency would be included in the third requirement of "bankrupt or insolvent or a winding-up Order has been made" and we will recommend that to the Minister and to the Trustees of the Fund.

However, the only choice before us is to attempt to find this claim as part of the first requirement and that is a requirement with respect to the recovery of a Judgment.

The Tribunal made a similar decision in the appeal of Mr. & Mrs. Seaford Tye (1989) 18 CRAT 158. The five requirements are set out and the claimants could not meet any one of them. The Tribunal said at p.164:

"We are left, therefore, to the conclusion that the Applicant cannot qualify for compensation having failed to satisfy the requirements prescribed by regulations. We sympathize with the Applicant and view the whole transaction with the distaste it deserves. Unfortunately, however, he has failed to meet the conditions which the legislation demands and we are, therefore, bound to deny the claim."

We have with regret, to reach the same decision here because we cannot bring relief to the Appellant under the terms of the Regulation as it is written. We would encourage the Appellant to obtain that Judgment and advance a claim to the Trustees. We would expect of course that since the Trustees are well aware of the circumstance, the matter concerning any problem that could arise under the two year notice provision, would not be considered as a barrier in this circumstance.

Accordingly, by virtue of the authority which is vested in this Tribunal under Section 15(1) of Regulation 665 of the Motor Vehicle Dealers Act, the Tribunal directs the Board of Trustees of the Motor Vehicle Dealers Compensation Fund to disallow the claim as it has been advanced so far.

SHAKIL LILA

APPEAL FROM A DECISION OF THE REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
DAVID APPEL, Vice-Chairman as Member
ARTHUR D. SISLEY, Member

APPEARANCES:

C. CHRISTOPHE, representing the
Registrar of Motor Vehicle Dealers and Salesmen

No one appearing for the Applicant

DATE OF
HEARING: 17 October 1991

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal appreciates the full presentation that has been provided by the Registrar's counsel. With that evidence before the Tribunal, it is clear that Shakil Lila has violated the provisions of registration under the Motor Vehicle Dealers Act.

As indicated by counsel, it is a condition of registration that the Applicant have a place of business that is filed with the Registrar, have an office and a sign. The evidence clearly identified the fact that this Applicant in the three locations for which he filed registration with the Registrar failed to follow those obligations. He, therefore, breached his conditions for registration and accordingly the Registrar's Proposal to revoke his registration on that count is quite proper in the circumstances.

The Registrar, however, went on to file a Supplemental Proposal based upon the fact of non-disclosure and relying, therefore, upon the provisions of the Act which require a registrant to carry on business in accordance with law and with honesty and integrity. Again the facts were clearly proven before this Tribunal that this registrant failed to respond correctly to the question #7 in his application for registration by not disclosing a prior conviction.

The Tribunal is also completely in accord with the submissions of counsel for the Registrar with respect to the

conviction for fraud. The evidence before the Tribunal given by the police officer was that the vehicle sold by the registrant was, in fact, a stolen vehicle and the circumstances surrounding that sale were sufficient to indicate that the registrant knew what he was doing and, in fact, his plea of guilty on his first appearance in Court has to be accepted by this Tribunal as an acknowledgement against his interest by the registrant. It is particularly upsetting to the Tribunal that this conviction dealt with an offence within the industry itself in which the registrant seeks to continue his operation.

It, therefore, is clear to the Tribunal that this Applicant is not prepared to carry on his business in accordance with law on both the counts of his registration failure and on the conviction dealing with the automobile in question. Nor is he prepared to carry on business in accordance with honesty and integrity. It is the view, therefore, of this Tribunal that the Registrar, in his duty to the public to ensure that in this regulated industry only fit persons are to be registered, has successfully demonstrated a proper decision and the Tribunal in accordance with the Brenner decision is not prepared in any way to overrule that decision.

Accordingly, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal including the supplementary Proposal.

PALACE AUTO SALES
(HOWARD EARL TULLOCH)

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
DEAN MYERS, Member

APPEARANCES:
JANE WEARY, representing the Registrar
under the Motor Vehicle Dealers Act

No one appearing for the Applicant

DATE OF
HEARING: 19 June 1991 Toronto

REASONS FOR DECISION AND ORDER

The Tribunal has considered the evidence put before it and submissions by counsel for the Registrar and it seems absolutely clear on the facts presented to the Tribunal and, in the absence of any evidence being put forward by the Applicant, that the Applicant is operating in contravention of the Motor Vehicle Dealers Act and Regulations. There is no doubt that he has been properly served in accordance with the Act and he has an obligation to keep a current address available to the Registrar.

Under the circumstances, therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs that, the Applicant being in breach of the Regulations of the Act, his registration as proposed by the Registrar shall be revoked

MINTO DORIAN ROY

APPEAL FROM A DECISION OF THE REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE THE REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
J.T. HOGAN, Member

APPEARANCES:

MINTO DORION ROY, appearing on his own behalf

JAMES GIRLING, representing the
Registrar of Motor Vehicle Dealers and Salesmen

DATE OF

HEARING: 10 December 1991

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal by the Registrar of Motor Vehicle Dealers and Salesmen pursuant to section 7(1) of the Motor Vehicle Dealers Act to revoke the registration of Mr. Roy. The Proposal was dated January 25, 1991.

The reason for the Proposal is that in the Registrar's opinion, the registrant Mr. Roy is not entitled to registration under section 5 of the Act because his past conduct affords reasonable grounds for belief that his business will not be carried on in accordance with law and with integrity and honesty.

Both parties agreed that the facts in the present case were as follows:

On August 30, 1990 Roy applied for renewal of his registration as a salesman.

In reply to question #6 of the application, Exhibit 9, which reads:

Have you ever been convicted or found guilty of an offence under any law or are there any charges now pending? If yes, attach full particulars on a separate signed and dated statement.

NOTE: Where the applicant has been

previously registered, list only those convictions which have occurred since the date of last filing,

Roy stated "No".

The office of the Registrar determined that at the time of completing his 1990 application for renewal, Roy had five charges of fraud pending against him.

It is to be noted that Roy appeared in Court in June 1990, some seven weeks before his renewal application, to plead to those charges. He was subsequently convicted on November 20, 1991 on two of the charges; the others were dismissed.

The first charge for which he was convicted was as follows:

Between the dates of January 10, 1989 and January 21, 1990, Roy did by deceit, falsehood or other fraudulent means defraud the public of \$22,104.18, the whole contrary to the Criminal Code.

The second charge was that Roy between the same dates unlawfully did by deceit, falsehood or other fraudulent means defraud Trento Motors Ltd., his employer, of \$7,200.

Mr. Roy is appealing from these two convictions.

In addition to the above charges, Roy also failed to disclose the following convictions registered against him under the Highway Traffic Act:

April 4, 1989	Disobey Traffic Sign
Jan. 2, 1990	Speeding 95 in 80 KMH
April 23, 1990	Failure to Surrender Motor Vehicle Permit
May 7, 1990	Speeding 70 in 50 KMH
June 1, 1990	Speeding 86 in 60 KMH
June 26, 1990	Speeding 90 in 70 KMH
July 3, 1990	Failure to have Insurance Card

July 20, 1990 Speeding 75 in 60 KMH

The Registrar concluded that the failure to disclose these convictions in answer to question #6 of the application, was a serious breach that led to the conclusion that Roy was disentitled to registration under the Act.

The first witness to testify was Robert Kenneth Pierce, Registrar of Motor Vehicle Dealers and Salesmen. In his testimony, he stated that he would be relying on the answers of Roy to question #6 only in supporting his assertion that Mr. Roy was not entitled to registration.

He testified that the purpose of question #6 is to determine if the applicant is honest. The fact that Roy did not disclose convictions such as traffic offenses, demonstrated a lack of honesty and integrity. That he had speeded was not in itself necessarily serious; that he did not disclose the speeding conviction, however was serious because it constituted a failure to answer a clearly stated question in an honest and forthright manner.

The fraud charges which Roy failed to disclose in answer to question #6 were far more serious in that they went to the very nature of Roy's activities under the Motor Vehicle Dealers Act. They related to deeds committed as a car salesman. That being the case, he was under an even greater responsibility to be forthright in disclosing these charges.

Had these charges been disclosed, the Registrar would have made intensive checks to determine whether it affected the fitness of Mr. Roy to carry on in the industry.

The purpose of the Act is to protect the public from persons who are unworthy to operate within the industry. The failure by Mr. Roy to make any disclosure, therefore, made it impossible for the Registrar to carry out his obligations under the Act. The failure to disclose alone justified in the Registrar's opinion his decision to revoke the registration of Roy.

Furthermore, if one relies on the application form alone, the new employer of Mr. Roy would also have been kept uninformed of these charges, the employer's certificate appears at the end of the application.

Mr. Roy testified in his own defence. He said that he signed the application for registration and renewal, but did not fill it in. He claimed that he did not even check the form before signing it and that all the material questions about his past

history were filled out by an employee of his new employer without asking him first for any information.

In response to a later question, Mr. Roy stated that he himself had filled out page 1 and the employee page 2 of the form. Page 2 contained questions 3 through 6 which dealt with the past activities and convictions or charges against Mr. Roy.

It is to be noted that the employee who was alleged to have filled out page 2, one Anne Dinech, did not appear to testify.

In cross-examination, Mr. Roy admitted that he knew that the form was a requirement in order for him to be registered in the industry. He had filled out one prior application before the present one.

Mr. Roy also stated that he attended courses at university.

Roy went on to explain his version of the criminal charges laid against him for which he was convicted. The Tribunal, after hearing his testimony, finds that Mr. Roy is not a credible witness. His answers were evasive and self-serving. Certain aspects of his explanations were not reasonable.

First of all, it is inconceivable that Mr. Roy would have completed the first page of his application, Exhibit 9, and let another person fill in page 2 which dealt with his personal history of which he alone would have known the information. It is also not credible that he would sign the application which he admitted knowing was essential to his being registered without first checking the information. It was clear from his testimony that Mr. Roy is too shrewd a person to do so. That he would sign a form without even reading it, therefore, is not credible.

On the other hand, allowing the form to be completed the way it was, worked only to the advantage of Mr. Roy given the gravity of the charges against him.

Having attempted to shift all the responsibility to Ms. Dinech, the Tribunal takes note of the fact that Roy did not subpoena her to appear at the hearing. He had more than sufficient notice of the hearing date to have issued such a subpoena.

In this regard, the Tribunal referred the Applicant to the case of John Ernest Barroso (1990) CRAT 422 at p.427 where the Tribunal held:

The Applicant's sponsoring broker was required to certify that the information given in this application was accurate to the best of her knowledge which she did, undoubtedly in good faith, without any inkling of all of this information withheld. In this last regard, the Tribunal attaches some significance to the fact that, after the initial sponsoring of the application before any of the withheld information had come out, no further support for the Applicant was provided to the Tribunal by the sponsoring broker. She did not appear here as a witness on his behalf and he did not have anything in writing from her, either by way of an affidavit or even a letter.

The Tribunal concludes that Mr. Roy has not proved that it was by inadvertence that question #6 was not fully answered. The Tribunal finds that Mr. Roy allowed the completion of the application form to be handled in such a way that a direct answer to question #6 could be withheld. To allow him to say that because he did not read the form and just signed blindly would relieve him of any responsibility, would go against the very nature of the Motor Vehicle Dealers Act and all other Acts in regulated industries. It is a cardinal cornerstone that the application by the registrant is integral to the whole process of deciding whether he should be registered. The form itself being so important, therefore, the very failure to fill it out himself or to verify it would be sufficient grounds to reject any defence of inadvertence.

The importance of disclosure was set out in the decision of Carl P. Dillon (1990) 20 CRAT 457 at p.460 where the Tribunal held:

Honesty and integrity are cornerstones of the legislation. Therefore, when we are confronted with non-disclosure, partial disclosure, and criminal convictions, we must consider them as a reflection of the Applicant's integrity. Is there an attempt to deceive the Registrar in this failure to disclose the convictions? The evidence may either point to that or to the conclusion that it was the result of inadvertence. The onus, however, is immediately put upon the Applicant to prove inadvertence. In this matter, the Applicant has failed to satisfy that onus.

The Tribunal also refers Mr. Roy to the case of Gilford Garage Service and Ambury (1982) CRAT at p.53 and Doherty vs. Registrar of Real Estate and Business Brokers (1989) CRAT where the Tribunal stressed the importance of the application being filled out properly and the right of the Registrar to refuse or to revoke registration where the failure to disclose was serious.

As was decided in the Brenner case, the Tribunal will only intervene in the Registrar's decision when the Tribunal believes that the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity.

The Tribunal believes that the Registrar in this case had reasonable grounds for believing that Mr. Roy would not carry on business in accordance with integrity and honesty.

The Tribunal, accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, directs the Registrar to carry out his Proposal to revoke the Applicant's registration.

617237 ONTARIO INC.
(AUTO IMPORTERS)

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
J.T. HOGAN, Member

APPEARANCES:
WILLIAM LEEKING, agent for Auto Importers

CHRISTINA CHRISTOPHE, representing the Registrar
under the Motor Vehicle Dealers Act

DATE OF
HEARING 25 April 1991 Toronto

REASONS FOR DECISION AND ORDER

The appellant was incorporated under the laws of the Province of Ontario on March 8, 1985, and although there appear to have been three shareholders and Directors of the company at that time, it appears the only remaining one is a Mr. W. Leeking appearing today on behalf of the appellant company. We may conclude, therefore, that he has sole control of the business.

It is not clear why the company was incorporated since its objects simply state the general term of transportation but since incorporation, the words "auto importers" have been added to the name. These, however, do not appear in the corporate records having been added in an application for the company's registration as an automobile dealer on January 31, 1990, and granted on March 6, 1990.

In its application for registration, the business address of the dealership was stated to be "1773 Baseline Road, Sutton West, Ontario". On a routine inspection, however, Ian Carry, a Compliance Officer employed in the Registrar's Office, found no vehicles on the premises and the doors locked. Instead of the expected sign designating the automobile dealership, there was simply a realtor's sign announcing the Remax firm had the property for sale. Enquiring in the neighbourhood, Mr. Carry learned that there had never been a motor dealership at that location, and the appellant's company was unknown.

Robert Pierce, Registrar of Motor Vehicles, giving evidence said that normally an inspection was made of a dealership within 60 days of registration simply to verify its location and that the inspection by Mr. Carry was done on May 3, 1990. He pointed out that about 350 applicants per year never set up business, but so often deal from their homes in contravention of the Act. As a result, he was mainly concerned about those attempting to deal in automobiles from non-business premises.

Mr. Leeking in his evidence said he had purchased about ten cars in Florida, but having brought them up here had no premises from which to sell them. He admitted that 1773 Baseline Road had never existed as a business but pointed out he had not read the Motor Vehicle Dealers' Act and was unaware of any provision requiring him to conduct his dealership solely at the address provided in his application for registration. His defence was simply that no one had ever given him any information. He further stated that the cars he sold had been through his own name only.

In reply, Mr. Pierce said a check through the records in his Department revealed automobiles sold personally prior to registration of this dealership, automobiles sold after registration but not from the business premises, and some sold after the issue of the proposal again with no business premises. He pointed out that these transactions contravene Section 3(a) and Section 3(3) of the Motor Vehicles Dealers' Act.

The documentary evidence, together with Mr. Leeking's own admissions, lead us to no conclusion other than that he has been continually operating in contravention of the Statute under which his company has been registered. He has learned that there are regulations which he must observe if he is to conduct the business under the Act. We cannot find the Registrar is wrong in his Proposal to revoke this company's registration and it will be so directed. In the event, however, if some time in the future the Applicant seeks registration and has available the proper facilities, he will be at liberty to bring another application for registration which may not be regarded unfavourably by the Registrar.

Accordingly, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

EMMA I. TERNER (REMEC SALES)
and CHAIM TERNER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATIONS

TRIBUNAL:

JAMES GRAY LESLIE, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
J.T. HOGAN, Member

APPEARANCES:

CHAIM TERNER, on his own behalf

B. WISE, representing the Registrar
of Motor Vehicle Dealers and Salesmen

DATE OF HEARING: 19 December 1991 Toronto

DECISION AND ORDER

In the presence of the applicant Chaim Terner and Beverly Wise, counsel for the respondent and upon hearing submissions on behalf of the Registrar respondent and upon reading the undertaking of the Applicant Emma Terner filed:

1. It is ordered that the Proposal of the Registrar against Chaim Terner be and is hereby withdrawn.
2. An order shall go in terms of the undertaking of Emma Terner and Remec Sales filed which undertaking is to be executed by Emma Terner with 10 days of the date hereof.
3. The registration of Emma Terner and Remec Sales is forthwith suspended subject to approval by the Registrar of its reinstatement.

WESTSHORE MOTORS,
ANDRE G. MALGUZZI and
TODD C. STAFFEN

APPEAL FROM A DECISION OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE THE REGISTRATIONS

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
PATRICK J. MCGURN, Member

APPEARANCES:

ANDRE G. MALGUZZI and TODD C. STAFFEN,
appearing on their own behalf

JAMES GIRLING, representing the Registrar under the
Motor Vehicle Dealers and Salesmen Act

DATE OF
HEARING: 1 November 1991 Ottawa

REASONS FOR DECISION AND ORDER

This is an appeal by Andre G. Malguzzi and Todd Staffen from the Proposal of the Registrar of Motor Vehicle Dealers and Salesmen to revoke their registrations as salesmen and that of the partnership as a motor vehicle dealer under the Motor Vehicle Dealers Act. The reasons for the Proposal given by the Registrar are that in his opinion the salesmen's registration should be revoked as they are carrying on activities that are or will be in contravention of the Act or the Regulations and/or is in breach of a term of condition of registration. A further ground for revocation is set forth in an additional Notice of Proposal containing Further or Other Reasons and Particulars which recites the past conduct of the registrant partnership affords reasonable grounds for belief that it will not carry on business in accordance with law and with integrity and honesty and the same reasons apply to each of the applicants Malguzzi and Staffen.

The Director's Certificates, Exhibits 7, 8 and 9, reveal that the partnership was registered on May 16, 1988 and the salesmen's licence of Malguzzi issued on May 23, 1991 while Staffen had been registered as a salesman since May 16, 1988.

In their application for registration as dealers, the business address was entered as Lot 18, Concession 9, Highway 7

R.R.6, Drummond Township, Perth, Ontario. Pursuant to the provisions of the Act, the registrant was required to maintain a vehicle lot with an office and sign at that location. On May 28, 1991, Mr. Raymond McKenna, an investigator from the office of the Registrar, attended at the premises and saw no vehicles, no sign and no indication of any operating business. A large sign on the premises indicated a body shop, but no auto dealership. He spoke to one Jerry Macphail who said he had been at that location since December 1990 and someone called Raymond had been there before him, but he did not have any evidence to offer with regard to Westshore Motors. A short distance down the road, McKenna said another dealer existed, one Anderson, who told him that Westshore had not been there for a very long time.

Returning recently, he had stopped at the premises and again saw no vehicles or sign on the lot and again saw no evidence of the existence of Westshore Motors. Mr. McKenna further testified the appellants had been involved in some three hundred vehicle transactions to his knowledge.

In the several applications for registration by both Malguzzi and Staffen, the questions #6 and 7 dealing with previous convictions were all answered in the negative thereby leading to the conclusion of deliberate non-disclosure. A search involving Malguzzi revealed the following: nine convictions under the Highway Traffic Act and three under the Criminal Code.

A search of the criminal and driving records of Staffen disclosed eleven convictions under the Highway Traffic Act and six under the Criminal Code.

None of these convictions of either of the appellants had been disclosed to the Registrar. The question which has always been of concern to the Registrar "Have you ever been convicted under any law of any country, or state or province thereof, of an offence, or are there any proceedings now pending" was never answered honestly by either applicant.

In his applications under the Real Estate and Business Brokers Act of May 16, 1985 and March 12, 1987 and his subsequent applications of March 17, 1988 and April 16, 1990, Malguzzi's reply to this question was "No".

Staffen in his application of March 17, 1988, June 5, 1989 and April 16, 1990, also responded in the negative.

The Registrar, Mr. Robert Pierce, pointed out in his evidence that the application is the first opportunity he has to judge the applicant's honesty and integrity and it is expected to

be answered honestly. He observed with some 120,000 registrations in his field, it is impossible to check them all and, therefore, he depends on the complete honesty of the applicant. With automobile dealers, the public depends so much on the word and reputation of the dealer otherwise they might be duped into buying used taxis and police cars with no disclosure of their former use.

With regard to business premises, he pointed out that this separates the reputable dealer from the curbside seller and books and records were expected to be kept in the office for a period of two years for inspection. The appellants had no books at the premises, no office and no vehicles. He further referred to section 13(3) and (4) of the Motor Vehicle Dealers Act which provides:

- 13.(3) It is a condition of registration as a motor vehicle dealer that the motor vehicle dealer,
 - (a) operates from premises located in Ontario that are approved by the Registrar;
 - (b) has an office for the conduct of business at each premises where the motor vehicle dealer operates; and
 - (c) has erected at each premises where the motor vehicle dealer operates, a sign that is clearly visible to the public that identifies the motor vehicle dealer's registered name.

None of these provisions were complied with by the appellants.

Todd Staffen in his evidence testified they had bought and sold some three hundred automobiles; the majority of which were bought at auction. He maintained the lot was being used for the business even though it had no telephone or vehicles located on it. If one wanted to reach the dealership, he said, the call would have to come to his home since the dealership had no listing.

In argument, Mr. Girling for the Registrar contended that the major concerns of the Registrar had been proved without doubt - that of the failure of both applicants to disclose their previous offenses and their failure to operate the business from the designated address, including the erection of the sign and the keeping of books on the premises.

We are of the view that the appellants are simply operating a curbside business not only in contravention of the Act, but with complete disregard for any responsibility to the public they would serve.

It is clear they have no respect for the Act or Regulations under which they are registered nor does it appear that it was ever their intention to establish a reputable dealership upon which the public might depend. They clearly avoid this responsibility in purchasing vehicles at the auction and turning them over for a quick profit avoiding the overhead of a business premises and all that it entails. As a result, we have no hesitation in directing the Registrar to carry out his Proposal.

Therefore, by virtue of the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, the Registrar is directed to carry out his Proposal.

NARINDER BHALLA

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
J. BEVERLEY HOWSON, Member
JOHN HARVEY, Member

APPEARANCES:

NARINDER BHALLA, appearing on his own behalf

C. CHRISTOPHE, representing the Registrar under the
Real Estate and Business Brokers Act

DATES OF HEARING: 17 September; 20 November;
2 December 1991

Toronto

REASONS FOR DECISION AND ORDER

On January 10, 1991, the Registrar of Real Estate and Business Brokers issued a Notice of Proposal to refuse registration to Narinder Bhalla ("Bhalla") as a real estate salesman under the authority of section 6 of the Act as follows:

- 6(1)(a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

The appeal was to be heard on September 17, and was adjourned as Bhalla did not appear. On November 20, the appeal was rescheduled and Bhalla asked for an adjournment to instruct counsel. The appeal was made peremptory for December 2 and Bhalla again asked for an adjournment as his lawyer was not available. The Tribunal refused the further adjournment and the appeal proceeded.

The Registrar set out in the Notice of Proposal four reasons to refuse registration to Bhalla:

First, that in his application of March 8, 1990, Bhalla answered "No" to question 5 which asks about any unpaid judgements. In his earlier application of February 11, 1982, a similar question was also answered "No". However, a search showed registration of a Writ of Execution for a judgement against Bhalla and Bhalla Insurance Agencies Ltd. for \$51,175.64 obtained by The Empire Life Insurance Company on November 15, 1982, and filed and since renewed in both the Peel and Halton Judicial Districts. Therefore, the Registrar states that this judgement was not disclosed by Bhalla on either application.

Secondly, that in his recent application, Bhalla answered "No" to the question which asks about registration of any kind, refused, suspended, revoked or cancelled.

On November 6, 1980, this Tribunal had made a decision on an appeal by Bhalla from the refusal of the then-Registrar to grant registration while Bhalla remained on probation from a conviction for fraud of March 3, 1980 - (1980) 9 CRAT 117. Bhalla was subsequently registered as a salesman on March 20, 1981.

Thirdly that on his recent application, Bhalla answered "Yes" to the question concerning any conviction and added by explanation:

I was charged under the Real Estate & Business Brokers Act for selling Real Estate when my License was not in order. In 1986 I was convicted and also forbidden (sic) not to sell for two years, hence two years passed by in March 1988. As per the Court order now I am entitled to apply and get my license in place.

The Registrar included the following excerpt from the sentence hearing of March 13, 1986 which, in his opinion, sets out a much more serious series of events than Bhalla admitted:

Mr. Bhalla, your lawyer described your indiscretions as regulatory offences implying, of course, that they are not as serious as Criminal Code offences and I must say that on the facts of this case I have to disagree with the submission. The Real Estate and Business Brokers Act recognizes the privileged position of agents and brokers. For a fee, these people guide their clients through the mine field of real estate transactions.

In the normal course of business, they hold significant amounts of money on behalf of clients. They hold a position of trust - trust in their expertise, trust in their integrity. The act is designed to maintain a proper level of expertise and integrity. Compliance with the act therefore becomes a matter of utmost importance for the consumer and for the reputable agents and brokers.

Basically, sir, not only did you ignore the requirements of the Real Estate and Business Brokers Act, but you propounded a scheme allowing you to act as a broker and agent while avoiding the scrutiny of the Registrar. It started in March of 1983 when you were either fired, dismissed or left the Peter Polity Real Estate where you had been working as a salesman. You failed to inform the Registrar as required by section 21, subsection 1 c). Peter Politi also failed to inform the Registrar and I hope in light of the subsequent events that he has learned his lesson on that score. In August of the same year you registered a business under the name of Peter Pouliki - with a 'U' added to the name - Realty without, of course, advising Peter Politi. This was a transparent act of deceit, the key to subsequent dealings in real estate. You also opened an account under the same name which was not designated as a trust account under the - in contravention of section 20, subsection 1 of the act. Then followed four transactions that netted you \$78,000 in commission. In all cases, you falsely represented yourself as a salesman for Peter Politi Real Estate or Crownview Realty.

On three occasions you received money which was not deposited in the proper account. On two occasions you converted the money to your own use before the completion of the transaction. If the offences before me are regulatory in nature, they were nonetheless committed with deceit or by

deceit, falsehood and other fraudulent means. Your course of conduct was calculated to frustrate the protections offered by the Real Estate and Business Brokers Act. Your scheme was not sophisticated, but quite effective. It allowed you to avoid detection for one and a half years during which period you earned \$78,000. It was done at considerable risks for the principles and the agents involved in all four transactions. This kind of activity must be discouraged. Furthermore, I note two convictions for fraud and one for possession of stolen property. You have learned nothing from the previous term of probation and fine imposed by the court. The inescapable conclusion then is that this court must send you to jail. For those reasons I therefore impose a sentence of three months in jail and for the protection of the public and to keep you away from temptation, I am also imposing a term of probation of three years with the following conditions: you will keep the peace and be of good behaviour, you will not work for a real estate agent or a broker, you will not apply for a real agent or broker's licence and you will not accept any remuneration for the purchase or sale of real estate.

Incarceration was reduced to 90 days to be served intermittently and a two year term of probation was imposed.

Fourthly, the Registrar states that a search of Bhalla's criminal record revealed an additional conviction on March 22, 1984 for possession of stolen property valued at more than \$200, for which Bhalla was fined \$400; and that this conviction was never shown or referred to on his recent application.

Randy Persaud is a registration officer who for three years has dealt with problem applications for the Registrar. He reviewed the four issues and explained to the Tribunal the two applications, the earlier decision of the Tribunal, the Writs of Execution filed and also presented a letter from the Legal Services consultant of Empire Life which stated that the judgement against Bhalla remained unpaid as of July 31, 1991. Persaud said that a telephone conversation on November 29 confirmed that no payment had been made to Empire Life on the judgement. Persaud could not

explain how registration was granted to Bhalla on March 20, 1981.

Gordon Randall is the Registrar of Real Estate and Business Brokers and gave evidence of Bhalla's career. He said that Bhalla had been registered with S.K. Din Real Estate from March 20 to April 14, 1981, and then with Alexander Politi from April 27 1981 until January 19, 1983 when that brokerage closed and all employees were terminated. Bhalla's activities thereafter are set out in the excerpt from the sentence of Judge Paris.

Bhalla had his licence renewed for two years from March 19, 1983 although a report of September 17 showed that he had been terminated by Politi on March 15, 1983. There was no record of any further application until the current one of 1990.

The Registrar stated that the criminal convictions were especially of concern to him since they were the acts of a mature man and their nature of financial dealings, fraud and the possession of stolen property were particularly serious and relevant to a real estate registration. The trust of a vendor who gives a key to a salesman brings a public duty to the Registrar to decide who shall be admitted in a regulated industry and the Registrar has decided that Bhalla is not such a suitable person.

The Registrar believes that Bhalla's actions show a pattern of disregard for the law over the past ten years and that his non-disclosure of convictions and the outstanding judgement make him unworthy to be a real estate salesperson.

Bhalla said that he had misunderstood certain questions and while he had made errors, he had broken no laws since 1986. He had managed a gas station and a chain of specialty stores in recent years and had never been questioned on his banking arrangements with respect to any outstanding judgement which he thought was cleared off years ago. He said that his new sponsoring broker would be prepared to supervise any terms and conditions of registration, but that person did not come before the Tribunal on Bhalla's behalf. He agreed that honesty and integrity were important in a regulated industry, and readily admitted his record stating that he did not intend to deceive anyone.

Bhalla said that he had shown the Notice of Proposal to his sponsoring broker who had not been aware of the conviction, the judgement and the earlier decision of this Tribunal, but he was prepared to employ Bhalla if there were no further problems.

Counsel for the Registrar stated that this Proposal clearly sets out events which show the Registrar's duty to refuse registration under both subsections of section 6(1) quoted earlier.

Bhalla's past conduct includes convictions for fraud, and under the Real Estate and Business Brokers Act; failure to disclose information and a major unpaid judgement. The judgement with interest must be close to \$120,000, in her opinion, and the burden is on Bhalla to contact his creditor.

She referred to earlier decisions of the Tribunal where revocation was ordered or registration refused because of outstanding judgements: (John N. Walton (1985) 14 CRAT 192; Focus Realty Limited and Vladimir Baotic (1986) 15 CRAT 176; Innovative Ventures Corp. and Robert A. Brown (1990) 20 CRAT 487).

Finally, she referred to the recent decision of John Ernest Barroso (1990) 20 CRAT 422 which reviews the principles of disclosure and sets out the guidelines of the 1983 Brenner decision reported in 19 CRAT 58 at 60.

The Tribunal agrees that the Registrar cannot here be said to be in error in the decision which he has made. Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse to register the Applicant as a real estate salesman.

ANDREW BREUER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL:

RICHARD F. STEPHENSON, Vice-Chairman, presiding
GORDON R. DRYDEN, Vice-Chairman as Member
MAURICE LAMOND, Member

APPEARANCES:

RICHARD M. ITTLEMAN, representing Applicant

BEVERLEY WISE, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF

HEARING: 24, 27 May 1991

Toronto

REASONS FOR DECISION AND ORDER

Upon hearing submissions by counsel for the Applicant Andrew Breuer and with the consent of counsel for the Registrar, this Tribunal by virtue of the authority vested in it under the Real Estate and Business Brokers Act declares that the appeal from the Proposal of the Registrar having been withdrawn, the Proposal dated November 30, 1990, together with the Notice of Further or Other Particulars dated May 10, 1991 shall stand and be in full effect and that the reinstatement of the Applicant Andrew Breuer as disallowed by the Registrar is continued.

CENTURY 21 CAMPBELL MUNRO LTD. AND
LETITIA CAMPBELL AND
CARMEN MUNRO

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATIONS

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
SELWYN CHARLES, Member
A.D. MANCHESTER, Member

APPEARANCES:

LETITIA CAMPBELL, on her own behalf
CARMEN MUNRO, on his own behalf
and representing Century 21 Campbell Munro Ltd.

C. CHRISTOPHE, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF
HEARING: 9, 10 December 1991 Toronto

REASONS FOR DECISION AND ORDER

This was a hearing before the Commercial Registration Appeal Tribunal to deal with a Notice of Proposal to revoke registration by the Registrar of Real Estate and Business Brokers as brokers of Century 21 Campbell Munro Ltd. and of Letitia Campbell. At the conclusion of the Registrar's case, Mr. Carmen Munro made a rather unusual motion to have himself added as a party to the proceedings and to amend the Notice of Proposal to revoke registration to include a Proposal to revoke his registration as well as those of the company and of Mrs. Campbell if the Tribunal should reach the conclusion that this should be done. Counsel for the Registrar consented to an Order to this effect and the Tribunal reserved its judgment on the motion and stated that it would deal with the same when it had heard the whole case.

Because of the conclusion which the Tribunal has reached as to the proper determination of the issues before it in this case requires this, the Tribunal hereby allows this motion and directs that the style of cause be amended to add Carmen Munro as a party hereto, and that the Notice of Proposal be amended to propose the revocation of the registration of Carmen Munro upon the same grounds as those upon which the Registrar of Real Estate and Business Brokers seeks the revocation of the registration of the other two parties.

The circumstances which have led these two brokers and their company into this predicament cannot be explained by any logical or reasonable means but only by the facts. We have here Letitia Campbell who has been a registered broker about 27 years, Carmen Munro who has been a registered broker over 20 years and their corporation which has been in place for 10 years or so and, except for matters arising out of the one piece of business in question here, there is no evidence of a single complaint against any of them over that whole period of time.

In 1984 they had employed by their company a registered real estate salesperson by the name of Joy Schrempf who apparently was a distant relative of Mrs. Campbell. The evidence was that she was not very experienced at that time. Shortly before November 1984, Joy Schrempf wished to sell a house which she owned herself at 468 Orchard Drive in Oakville. She listed it through Century 21 Campbell Munro Ltd. as a listing broker and as a multiple listing, and buyers were found through W.H. Bosley & Co. Ltd. as a selling broker.

The representative of that firm who dealt with the transaction was a broker named Malcolm MacGillivray. An offer was originally brought by Mr. MacGillivray from Sam Mason and Marion Mason of Sudbury for \$94,000 with a deposit of \$2,000. Mr. Munro and Mrs. Campbell assisted Joy Schrempf in negotiating with Mr. MacGillivray so that finally on November 28, 1984, an Agreement of Purchase and Sale was executed between the parties for a sale for \$99,000 with a deposit of \$5,000, and with a provision that this deposit should be placed in an interest bearing account with interest payable to the purchasers on closing which was fixed for April 15, 1985. Joy Schrempf agreed to pay a commission of 6% of which half was to go to Bosley & Co. Ltd. as selling broker and the other half was to be divided \$178.20 to Century 21 from which the company held its franchise and the remainder of one-half each to Century 21 Campbell Munro Ltd. as listing broker and to Joy Schrempf as selling salesperson. On December 1, 1984, a Trade Record Sheet setting out these arrangements on an Ontario Real Estate Association form was made out. Up to this point, everything appears to have been done properly and to be in order.

The trouble began when the purchasers came to the conclusion that they would not move from Sudbury to Oakville as they had planned, and they had to "get out of the deal" which amounted to a breach of contract on their part. They had retained a solicitor in Oakville to act for them in the transaction, Mr. William Kerr who was a witness at the hearing. They gave him instructions to get them a release on the best terms he could.

Mr. Kerr made the necessary research and concluded that if an action were brought against his clients, they would probably be liable for damages in the area of \$10,000-11,000. He began by attempting to settle with Joy Schrempf for \$3,000 and was able to settle for \$5,000 upon the understanding that his clients would get a full release from Joy Schrempf in return for directing the \$5,000 deposit plus any interest accrued on it to be paid out of the trust to her. He obtained instructions from his clients to do this and he had prepared and signed in January 1985 by Mr. and Mrs. Mason and by Joy Schrempf a mutual release to this effect and further, in February of 1985, a direction signed by Mr. and Mrs. Mason directing the release of the deposit monies aforementioned plus the accrued interest to Joy Schrempf. Neither of the documents contained a date as to the day of month, but only the month and the year and neither of them had a witness signing as to the signatures. The circumstances, however, in which these documents came into existence, were signed and were exchanged, were such, however, that there should never have been any doubt in anyone's mind as to their validity.

Before agreeing to the proposed settlement, Joy Schrempf sought to have the 6% commission for which she was responsible reduced to 3% in these circumstances. To this end, she spoke first to Mr. MacGillivray who agreed to reduce Bosley's commission from \$2,970 to \$1,485 providing Century 21 Campbell Munro Ltd. did the same. It was the evidence of Ms. Schrempf that she then went to her own brokers, Mrs. Campbell and Mr. Munro and that they agreed to the same arrangement. On this last point, there is a conflict in the testimony between Ms. Schrempf and Mr. Munro and Mrs. Campbell as they say, it was agreed that Century 21 as franchiser was still to get its \$178.20 and Century 21 Campbell Munro Ltd. was still to get the \$1,395.90 which they would have got under the original commission agreement with all of the remaining balance including the accrued interest going to Ms. Schrempf.

At this point, Mrs. Campbell and Mr. Munro consulted with their solicitor Mr. Robert Micheli concerning their position and appeared to have obtained the first of some quite questionable advice from him. Mr. Micheli advised Mr. Kerr that the release and the direction which he had provided were not proper because of the lack of date as to the day aforementioned as a result of which, Mr. Kerr had the documents redone and signed again by the parties with a specific date of March 25, 1985 on the direction and of May 20, 1986 on the mutual release.

In the meantime, Ms. Schrempf had been pressing Mrs. Campbell and Mr. Munro to get her money out of the trust and to get the matter completed and on March 12, 1985 or very shortly thereafter, it was arranged that she should attend at the company's

office for this purpose. When she did this, she was given the following documents: the first was a sheet of paper with some handwritten calculations showing a total in the trust of \$5,068.63 being the deposit plus the interest then accrued. It then showed the \$1,485 to be paid to Bosley & Co. as everyone had agreed, but then by way of commission to the listing broker \$1,395.90 to the office (being Century 21 Campbell Munro Ltd.), \$1,395.90 to "Joy" and \$178.20 to Century 21 as franchiser. The remaining balance of \$545 plus the \$68.63 interest remained for "Joy".

A second document was a so-called "Mutual Release" on the Ontario Real Estate Association form purporting to be between Sam and Marion Mason and Margaret Joy Schrempf and Century 21 Campbell Munro Ltd. and W.H. Bosley & Company Limited. This document was dated March 8, 1985 and in the places provided for the signatures of Sam Mason and Marion Mason was typed in the words "per attached letter from William B. Kerr". In the place for a witness was typed in the name of William B. Kerr opposite both of these, and in the place for the date was typed in February 19, 1985. In the place for the signature of Century 21 Campbell Munro Ltd., the document was signed by both Mr. Munro and Mrs. Campbell with a date of March 8, 1985 and someone having signed as a witness and then this name was crossed out. In the place for the signature W.H. Bosley & Company Limited was typed in the words "As per attached letter of February 27, 1985" with that date and in the place for the witness for this signature was typed in the name Malcolm MacGillivray. The line for the signature of the vendor Margaret Joy Schrempf had nothing on it as was also the case for the line as to the witness to her signature and as to its date. Finally with this package were two cheques payable to Joy Schrempf dated March 12, 1985 from Century 21 Campbell Munro Ltd. for \$1,337.97 and \$613.63 respectively. The first of these was for her share of the commission as set out on the aforementioned handwritten sheet less payable deductions for pension and unemployment insurance, and the second was for the balance as shown.

There was also filed as an exhibit, a second Trade Record Sheet on the transaction dated January 30, 1985 which showed a total commission receivable of \$2,970 with \$1,485 to go to Bosley & Co. Ltd. as selling broker; \$89.10 to go to Century 21 as franchiser and \$697.95 each to Joy Schrempf as Listing Salesman and to the "Office" being the broker company.

When Ms. Schrempf saw what the brokers had done, she did not cash the cheques and refused to sign the new release. During this period Ms. Schrempf also, had a complaint concerning Mr. Micheli. As he was her employer's solicitor, she had retained him to act for her as vendor in the transaction and when it aborted, she went back to him and gave him instructions with regard to the

settlement and the documents for carrying it out. Later when she returned to his office to deal with some of this, she saw that he had not followed her instructions, but had followed other instructions which he had obviously obtained from Mrs. Campbell or Mr. Munro and she did not use him any further.

On March 5, 1985, Mr. Micheli wrote to Mr. Kerr advising that his clients would release the funds upon the execution of a new mutual release, a copy of which he enclosed. This document provided for the payment of \$1,485 to Century 21 Campbell Munro Ltd. which was not acceptable to Ms. Schrempf.

On March 6, 1985, Mr. Kerr wrote to the Registrar of Real Estate and Business Brokers and advised him of the problem which had arisen. Mr. Kerr advised that he was attempting to assist Mrs. Schrempf because it is in his client's interests that the matter be completed as arranged.

On April 3, 1985, an official in the office of the Registrar wrote to Century 21 Campbell Munro Ltd. advising that in the opinion of its legal section, the Mutual Release was sufficient authority to release the trust monies, that the Release which the broker had submitted was not in accordance with the terms of the trust and stating further

Trust monies are not classified as commissions. If you wish to claim commission on this transaction I would suggest you take recourse through the courts.

Under the circumstances, we recommend that you return the deposit to Mrs. Schrempf in accordance with the release signed by both purchaser and vendor.

Mrs. Campbell and Mr. Munro gave this letter for reply to their solicitor Mr. Micheli, who had a telephone conversation with Stephen Martin, the solicitor advising the Registrar's office and on April 11, 1985, Mr. Micheli wrote to the Registrar's office confirming an arrangement whereby the monies could remain in the trust account of Century 21 pending resolution as to who was entitled to what share of the funds. On May 3, 1985, an officer in the Registrar's office wrote to Century 21 also confirming this arrangement and stating in part "This money is being held in trust upon the understanding that you are to commence an action immediately. Failing this, you must pay the full amount to the vendor."

There was filed, as an exhibit, a copy of a draft statement of claim in the District Court of Ontario by Century 21 Campbell Munro Ltd. as plaintiff against Margaret Joy Schrempf as defendant claiming judgment in the amount of \$5,940.00 plus interest and costs. There is no indication on this document that it was ever issued although an address of the court office is shown as that of the District Court in Milton. There is also no indication of the name of any solicitor who prepared it and in the place noted for the name, address and telephone number of the solicitor, those details are given for the plaintiff itself. Other evidence was given to the Tribunal that at some stage, there was a number for this action which would indicate that it was issued, but it was clear upon all of the evidence including that of Mrs. Schrempf that it was never served and most probably has expired.

Nothing further appears to have been done to resolve the problem until September 25, 1986, when the Registrar wrote to Century 21 Campbell Munro Ltd. referring to the previous letter of April 3, 1985. In that letter it is stated that the Registrar's office had verified the issue of the aforementioned Statement of Claim on September 12, 1985 as #590/85 but that no service was ever effected and the action is dormant. The Registrar goes on to state that he looks at this conduct on the part of the registrant with a considerable degree of concern. He states that at the present moment, there appears to be an apparent breach of trust and misuse of the court system. He goes on to refer to Section 6(1)(b) of the Real Estate and Business Brokers Act and invites the company to provide him with any reasonable explanation as to why a proposal to revoke its registration for breach of trust should not issue. He gave the company until October 15, 1986 to respond.

Mrs. Campbell and Mr. Munro forwarded this letter to Mr. Micheli for response and he on October 3, 1986, wrote to the Registrar a letter in which he stated that his clients had not been in receipt of a "proper" release until four weeks ago. It is not clear to what he was referring four weeks prior to that date, but in any event, this statement is completely false. He also states that his client's actions are based upon a dispute over commissions and not over trust funds.

However, this action in 1986 did not bring the matter to a head. There were some changes in the Registrar's office and for one reason or another it was not followed up until the new Registrar, Mr. Gordon Randall took it up in July 1988. On July 27 of that year, Mr. Randall wrote to Century 21 Campbell Munro Ltd. a letter referring to some of the previous activities and requesting that it forward to his office prior to August 10, 1988, written assurance that it had released the trust money to Mrs. Schrempf and stating further that if it failed to deliver such

written assurance, it would be liable to proceedings under the Act. Again this action did not bring a resolution of the problem and for various reasons, further delay occurred. Finally on April 17, 1990, Mr. Randall wrote to the company and to Mrs. Campbell referring to the matter and asking some very direct questions.

1. Has Century 21 Campbell Munro Limited complied with the Direction it received from Mr. and Mrs. Mason? If so, when did Century 21 Campbell Munro Limited comply? If not, confirm the amount Century 21 Campbell Munro Limited holds in trust pursuant to the above aborted transaction.
2. What is the status of action #590/85 issued September 12, 1985 by Century 21 Campbell Munro Limited?

The Applicants forwarded this letter as well to Mr. Micheli, their solicitor for response and he replied that the monies held in trust are the amount of \$4,455 being the original sum of \$5,000 less the amount of \$545 remitted to Mrs. Schrempf pursuant to the agreement of all parties. He went on to say,

The current action in District Court has not yet reached trial. You may recall the issue litigated and the monies are held pursuant to an implied and resulting trust pending determination of entitlement to proceeds...

In giving evidence at the hearing, Mr. Randall stated that he found this response offensive and the Tribunal agrees with him.

Over this whole period, in spite of the clear requirements set forth by two different incumbents of the office of Registrar and other persons in that office, the trust funds were not paid out as directed and finally on November 9, 1990, the Registrar issued his Proposal herein. In that Proposal, as amended in accordance with the Order of this Tribunal, it is the Registrar's opinion that Century 21 Campbell Munro Limited, Letitia Campbell and Carmen Munro are not entitled to registration under Section 6 of the Act as their past conduct affords reasonable grounds for belief that they will not carry on business in accordance with law and with integrity and honesty and further because they are carrying on activities in contravention of the Act. The Proposal goes on at length to set out details in accordance with what we have set out above.

It states in paragraph 17 thereof:

17. The continual failure of the Registrants to disburse trust funds in accordance with the clear and explicit Direction received in February 1985, constitutes a breach of trust and a breach of the Act.

The Proposal also refers to a failure of the Registrants to disclose on several applications for renewal of their registration, the fact that the company was also registered for a period of time with the Ontario New Home Warranty Program. It was the evidence of Mr. Munro and of Mrs. Campbell that they did not realize at the time they filled in certain applications that they were required to disclose this information and they did put it on the form as soon as they realized they should do so. In all of the circumstances, the Tribunal does not attach substantial significance to this particular issue as it is much less serious than the other one.

As a result of the issue of the Proposal, a meeting took place in the Registrar's office in January of 1991 at which were present Mrs. Campbell, Mr. Munro, Mr. Micheli and Christina Christophe acting as counsel for the Registrar. At this time, it came to light that the sum of \$613.63 which had allegedly been paid to Mrs. Schrempf earlier had not, in fact, been paid and therefore the whole sum of \$5,000 plus accrued interest was still coming to her.

It also came to light that when she had refused to cash the cheques which were given to her on or very shortly after March 12, 1985 and the money was put back into trust, it was put into the company's general trust account which did not accrue any interest. This raised a very substantial issue as to interest payable in accordance with the trust since that time. On February 11, 1991, Ms. Christophe wrote to Mr. Micheli setting out the Registrar's position that the trust monies must be paid immediately to Mrs. Schrempf including interest at 8% per annum since November 28, 1984, which by the time of this letter represented a total payment of \$8,055.90.

Mr. Micheli responded to this letter by one of February 13, 1991 and attempted to make a distinction between the trust existing between the vendor and the purchaser which he said was extinguished by the subsequent trust created by the forfeiture of the deposit monies, and the trust subsequently created between the vendor and the agent and said that the latter trust did not contain any provision that the monies be held in an interest bearing account.

On April 26, Ms. Christophe replied to Mr. Micheli stating that the original trust created by the Agreement of Purchase and Sale dated November 28, 1984 was never extinguished and that his clients should have complied with the clear and explicit direction signed by all parties in February of 1985.

On May 3, 1991, Mr. Micheli replied to Ms. Christophe again, in turn, and states that in April and May of 1985, it was understood by all parties that these funds were being held in the general trust account of the broker and not in an interest bearing account. He goes on to make an inexplicable reference to interest in the general account being remitted to the Law Society of Upper Canada. A review of the correspondence does not support Mr. Micheli's position taken in this letter.

Mr. Micheli would appear to be open to criticism on another score with regard to this last mentioned letter. The original of it was not received in the Registrar's office and the existence of it in the hands of his clients was only discovered by Ms. Christophe during a telephone conversation with Mr. Munro in November at which time, at her request, Mr. Munro sent her a copy of it. On November 19, 1991, Ms. Christophe sent by facsimile transmittal, a copy of this letter to Mr. Micheli with a request to confirm whether or not it was more than a draft letter created solely for his client's perusal.

Upon Mr. Micheli confirming on November 20, 1991, that this letter was supposed to be sent, Ms. Christophe responded to him on November 25 that she disagreed with its contents and that a review of the correspondence makes it abundantly clear that the parties and their respective clients are not in agreement.

The position of the Applicants before the Tribunal was further damaged by the next action taken by Mr. Micheli. On November 27, 1991, he wrote to Ms. Christophe acknowledging receipt of her letter of November 25 and simply responding to the effect that it appears that the position outlined by Mr. Martin, who we understood was her predecessor, was at variance with the position taken by her on behalf of the Registrar. On this point, it is sufficient to note, that Mr. Martin, who gave evidence as a witness at the hearing, denied completely any arrangement as suggested by Mr. Micheli and confirmed that the position of the Registrar throughout was precisely that put forward by Ms. Christophe and that that was always his position when dealing with Mr. Micheli.

The Tribunal has no difficulty whatever in accepting the evidence of Mr. Martin and rejecting completely what was put forward by Mr. Micheli in his correspondence on this point. Having

made this reference to the variance in the two positions in his letter of November 27, 1991, Mr. Micheli goes on to advise Ms. Christophe that it would appear to be necessary for him to be called to give evidence on the matter and that it would not be appropriate for him to be both counsel and witness and, accordingly any future correspondence should be directed to Century 21 Campbell Munro Ltd. directly or to their new solicitor, the name of whom she should contact them directly to obtain.

While Mr. Micheli wrote all this in his letter to Ms. Christophe on November 27, 1991, he did not inform his clients that he was no longer acting for them and Mr. Munro and Mrs. Campbell only found out during a telephone conversation with Ms. Christophe in which she advised them and sent them a copy of Mr. Micheli's letter of November 27.

In his evidence at the hearing, Mr. Munro said until he obtained this information from the Registrar's office, he and Mrs. Campbell believed that Mr. Micheli was going to represent them at the hearing. It was also established that neither party to the proceedings had either indicated to Mr. Micheli or raised with him in any way the suggestion that they might call him as a witness and he did not in fact appear as such.

Mr. Munro stated that by the time he and Mrs. Campbell learned that Mr. Micheli was not going to act for them, it was too late to retain another solicitor and expect him to be able deal with all of the documentation and details of this matter and prepare for the hearing as scheduled.

There are a few other references we wish to make to the evidence. In their testimony, both Mr. Munro and Mrs. Campbell stated that Mr. Micheli was acting throughout as their solicitor and they relied upon him for legal advice and for guidance.

Mrs. Schrempf subsequently sold her home in Oakville and moved to Cambridge, Ontario. It seems clear that for undisclosed reasons, she did not reveal her whereabouts to the Applicants and perhaps to other people. This undoubtedly made some contribution to the delay in dealing with the matter but, in the circumstances, it is not a factor which affords much excuse to the Applicants for their conduct. Mr. Randall stated that at the meeting in his office in January aforementioned, Mr. Munro said that if the vendor had been anyone other than a salesperson on their staff, the money would have been paid over immediately in accordance with the direction.

On December 4, 1991, five days before the opening of the hearing, the Applicants over the signature of both Mrs. Campbell

and Mr. Munro sent to Ms. Christophe a letter advising that they had that day forwarded to Ms. Schrempf by special delivery and registered post, a certified cheque payable to her in the sum of \$8,569.12 and attached was a photostat copy of the cheque as issued showing it to have been certified. In giving her evidence, on December 9, Ms. Schrempf said that she had not yet received this cheque. Finally, both Mrs. Campbell and Mr. Munro stated emphatically that they never intended to breach any trust obligations, that they never intended to be disrespectful to the Registrar or his office and that they were at a complete loss to understand how this dispute which was originally over a sum of less than \$800 had been allowed to escalate into such a potentially disastrous situation for them.

In coming to its decision in this case, the Tribunal must first make certain findings of fact. The first of these is in respect to the trust which is alleged to have been breached. In this respect, the Tribunal accepts the position put forward on behalf of the Registrar that there was from the beginning and remained up to the time of the hearing, only one trust being that created the Agreement of Purchase and Sale on the 28 day of November 1984. The trustee throughout was the listing broker Century 21 Campbell Munro Ltd. The corpus or subject matter of the trust was the \$5,000, together with such interest as should accrue upon it in accordance with the terms of the trust. The beneficiaries of the trust were Margaret Joy Schrempf as vendor, and Sam Mason and Marion Mason as purchasers as their interests should appear from time to time. An explicit term of the trust was that the sum of \$5,000 be placed in an interest bearing instrument with interest payable to the purchaser on closing. If the transaction had proceeded and been closed in the regular way, it would have been the duty of the trustee to deal with this deposit as is customary in such completed real estate transaction which undoubtedly would have resulted in its being applied upon the \$5,940 commission receivable in accordance with the Trade Record Sheet of December 1, 1984 aforementioned.

However, the aborting of the transaction and the making of the settlement between the vendor and the purchasers as a result thereof, changed the entitlement of the various beneficiaries of the trust but did not change the duty of the trustee with regard to the same. As a result of the Mutual Release and Direction which Mr. Kerr had signed to carry out the settlement which he had procured, it was the duty of Century 21 Campbell Munro Ltd. as trustee to pay over the \$5,000 plus the interest accrued thereon to Mrs. Schrempf and as beneficiary of the trust, she had such interest in this being done. Mr. and Mrs. Mason also had a continuing interest in the trust at that time, namely, that the trustee should carry out the direction which they had signed which,

in effect, would carry out the terms of their settlement with Mrs. Schrempf and entitle them to the benefit of her complete release of them from any further liability as a result of the aborting of the original transaction. The failure of the Applicants to have Century 21 Campbell Munro Ltd. as trustee carry out this simple and straightforward duty amounted to a breach of trust to all three beneficiaries of the trust and amounted to a breach of the provisions of Section 20(1) of the Real Estate and Business Brokers Act.

Both Mr. Munro and Mrs. Campbell were experienced brokers with years spent in their profession and they knew or certainly ought to have known that what they did amounted to a breach of trust as aforementioned. However, if they did not know this initially, it was certainly brought to their attention most forcibly over a number of years by Mrs. Schrempf, Mr. Kerr and particularly by the Registrar and officials in his office. The language which was used in correspondence to them left no doubt as to the meaning intended to be conveyed.

A criticism to be made of their conduct must be accelerated substantially by the fact that they dragged this dispute over a period of seven years with the resulting loss and risk to the three beneficiaries of the trust (all of whom were consumers entitled to the protection of the Act) and put the Registrar and his office and, indirectly, the taxpayers of this Province, to a substantial degree of unjustified trouble and expense. In his evidence before the Tribunal, the Registrar referred to this as being a "very labour intensive file" and these words appear to put it mildly. Were it not for certain mitigating factors to which the Tribunal will now refer, the Tribunal would have no hesitation in directing the Registrar to carry out his Proposal with regard to all three Applicants.

The first mitigating factor is the fact that all three Applicants have been registered as brokers and have carried on business for the periods of time indicated above without any evidence of a single complaint against their conduct other than arising out of this transaction in question. The next factor is that they do appear to have received bad legal advice from Mr. Michelini. While the law is clear that acting on bad legal advice does not excuse a party from being found in breach of a legal duty such as that imposed by an injunction or by a trust or otherwise, such fact should be very much taken into consideration when determining the penalty which should be imposed upon such party as punishment for the breach. Next the Tribunal had substantial concern throughout the hearing for the position of the Applicants before it having to conduct their own case without counsel. While it is not possible to identify any specific points upon which

counsel might have bettered their position, much of the conduct of their case showed what might be termed a strange fatalism as to what was going on. Even at the very end of the argument, neither of them was able to state with any particularity what they hoped the result would be except simply to say that they did not wish to have their registrations revoked.

During the course of the argument, the Tribunal asked counsel for the Registrar what terms the Tribunal should impose if it were come to the conclusion that the circumstances did not warrant the revocation of all of the registrations, but rather suspensions upon terms and conditions. In response to this question, she argued that the facts amply supported the revocation of the licences but, if a lesser penalty were to be considered, it would have to include suspension of these three brokers for a term being a longer of either one year or the time required to complete and pass certain real estate courses which she outlined and to which we shall refer hereunder.

In the course of her argument, Ms. Christophe relied upon certain definitions of trust and breach of trust to which we need not refer in the light of the findings which we have made above. She also relied upon certain jurisprudence of this Tribunal and of the Divisional Court in the case of Re Brenner. Some of this jurisprudence referred to the issue of failure to disclose information by way of accurate answers to certain questions on the application for registration or renewal thereof. We have already referred to this issue above as not being of so much comparative significance in this case and need not refer to it further.

Taking into account:

1. The culpability as found of the Applicants in breaching the trust;
2. The culpability of the Applicants in dragging the matter over seven years with the results for all other parties involved as indicated;
3. The mitigating factors as outlined above;
4. The fact that the conduct of the Applicants shows a lack of understanding of fundamental principles governing the proper conduct of real estate brokers in Ontario;

the Tribunal has reached the conclusion that the conduct of the Applicants cannot be allowed to go without punishment, but that the penalty being sought by the Registrar, namely the revocation of the registration as brokers of all three Applicants, is unduly harsh

in the circumstances. It would mean the abrupt end of the present means of livelihood not only of the three Applicants, but of all salespersons and employees on their staff. In view of the mitigating circumstances, we consider this to be an unduly harsh result.

However, the Tribunal does consider their conduct to be of such seriousness as to warrant as substantial a penalty as we can devise without leading to this result. Consideration of this is made more difficult by reason of the fact that theirs is a franchise operation as a Century 21 franchisee and any complete suspension would undoubtedly lead to a loss of the franchise which they could probably not regain. On the other hand, consideration of this problem is made perhaps easier when we take into account the remarks and suggestions of counsel for the Registrar concerning the benefits to be had from requiring the individual Applicants to take and pass certain real estate courses.

Before we outline the specific terms of the Tribunal's Order, we wish to comment upon the application of one of the authorities to which Ms. Christophe referred being the case of Brenner vs. Registrar of Motor Vehicle Dealers and Salesmen. The crux of that decision is that the Divisional Court held that the Tribunal should only have refused to direct the Registrar to carry out his Proposal if it thought that the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. It went on to say that the Tribunal had not appeared to have directed itself to this question and made no finding that in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that he would not carry on business in accordance with law and with integrity and honesty. In this case, the Tribunal has directed itself at length as indicated above to the question as to what conclusion should be drawn in this respect from the conduct of Mrs. Campbell and Mr. Munro, and while it concurs emphatically with the Registrar that this conduct is open to severe criticism, for the reasons given above, it does not believe that it warrants the drastic penalty being sought.

By virtue of the authority vested in it by Section 9(4) of the Real Estate and Business Brokers Act of Ontario, the Tribunal directs as follows:

1. That the Applicant Century 21 Campbell Munro Ltd. shall furnish to the Registrar not later than January 31, 1992, proof which is satisfactory to the Registrar that the aforementioned sum of \$8,569.12 has been received by Joy Schrempf from it. Provided such proof is received in accordance herewith, the Registrar shall

not carry out his Proposal with regard to that Applicant. Provided, however, that such proof is not received within the time limited, the Registrar shall carry out his Proposal with regard to that Applicant.

2. Both the Applicants Letitia Campbell and Carmen Munro shall be required before December 31, 1992 to have enroled in, completed, and satisfactorily passed the following courses:

- a) phase 2 of the real estate course;
- b) phase 3 of the real estate course;
- c) course upon principals of real estate property law;
- d) course on effective office management;
- e) course on professional real estate brokerage.

Provided these Applicants comply with this direction, the Registrar shall not carry out his Proposal with regard to them. Provided, however, that either of them does not comply with this direction, the Registrar shall forthwith carry out his Proposal with regard to such Applicant.

3. The registration of the Applicant Letitia Campbell shall be suspended from February 1, 1992 to May 31, 1992.

4. The registration of the Applicant Carmen Munro shall be suspended from the June 1, 1992 to September 30, 1992.

JIMMY V. DEMARIA

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
TIBOR P. GREGOR, Member
MAURICE LAMOND, Member

APPEARANCES:
DIANNE L. MARTIN, representing the Applicant

ALVIN TORBIN, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF
HEARING: 1 February 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant Jimmy V. DeMaria from a Proposal of the Registrar of Real Estate and Business Brokers dated June 1, 1990. The Applicant filed an application on March 2, 1990, for registration as a real estate salesperson in Ontario and the Registrar proposes to deny the application, and refuse the Applicant registration on the grounds that the past conduct of the Applicant affords him reasonable grounds for belief that the Applicant would not carry on business in accordance with law, and with integrity and honesty.

This case has raised some quite difficult questions and considerations both for the Registrar and for this Tribunal including one concerning which the Registrar readily admitted requires the disregarding at some point of a general rule which he has customarily applied, to the effect that he will not grant a license to an Applicant who, as a result of a criminal conviction, is still on probation or on parole. A proper conclusion of this appeal can only be reached by a careful application of the relevant legal principles, as established by the authorities, to the relevant facts of this case.

Since the most critical question for determination by the Tribunal is the application of the test laid down by Southey J. in the often quoted case of Brenner and the Registrar of Motor Vehicle Dealers and Salesmen, a good point of beginning will be to set out this test.

Near the bottom of page four of the report of which we have, Southey J. puts it:

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

There is little, if any, dispute as to any of the relevant facts with which we have to deal although there may well be considerable dispute as to the proper inferences which should be drawn from some of them. To do justice to the Registrar's position, it is necessary to consider it rather fully and I, therefore, set out his Particulars for his reasons and his conclusions or opinion as found in his Proposal.

C. PARTICULARS

IT IS ALLEGED AS FOLLOWS:

1. DeMaria applied for registration as a salesperson under the Act by application dated March 2, 1990.
2. In response to question 2 of the application pertaining to occupation for the last three years, DeMaria answered as follows: "I have been incarcerated during the past years, but I have taken correspondence courses, plus skilled courses".
3. In response to question 6 of the application: "Have you ever been convicted or found guilty of an offence under any law or are any charges now pending? If yes, attach full particulars on a separate signed and dated statement", DeMaria responded "Yes" and submitted, along with his application, a letter directed to the Registrar, dated March 1, 1990, regarding the conviction.

4. The letter referred to in the previous paragraph also included a letter from an official of the Correctional Service of Canada dated February 28, 1990, which among other things stated that:

"Mr. DeMaria entered into the Correctional system in April 1981 on a charge of 2nd degree murder under provisions of the Criminal Code of Canada. After he was charged, Mr. DeMaria was granted bail which enabled him to remain in the community whilst waiting for his trial. The reason he was granted bail was because the judge, Justice Reid, felt that Mr. DeMaria's offense resulted from what he described, 'A classic case of self-defence'. Mr. DeMaria was on bail for a total of eight months prior to his trial. He was ultimately convicted of 2nd degree murder and was given the minimum sentence of ten years before parole eligibility. Because he was granted the minimum sentence for his conviction, this only reflects the manner in which the judge viewed the gravity of his offence when considering the sentence imposed on Mr. DeMaria. The maximum sentence could have been invoked which is 25 years, but as mentioned the trial judge gave Mr. DeMaria the minimum sentence.

5. The Registrar did cause a search to be made of DeMaria's history of convictions. Said search against DeMaria revealed the following convictions:

Date and Place	Charges	Disposition
Aug 19/76 Toronto	Fail to appear	Fined \$300 i/d 60 days
Sept 20/82 Toronto	Murder	Life

D. REGISTRAR'S CONCLUSION OR OPINION

1. DeMaria has been convicted of the very serious criminal offence of second degree murder.
2. Further, DeMaria has been convicted of the offense of failure to appear.
3. The murder conviction under the Criminal Code is one of the most reprehensible crimes one can commit. Thereby, the Registrar alleges and concludes that DeMaria's past conduct affords reasonable grounds for belief that he will not carry on business in the future in accordance with law and with integrity and honesty.
4. The intent and purport of the Act is clearly to protect the public interest. The past activities of Applicant resulting as they did in charges for serious offenses and convictions under the Criminal Code, as aforesaid, detract from or militate against protection of the public interest and warrant disentitlement to registration under the Act. This is particularly so because the convictions include that of second degree murder.
5. Every person, such as the Applicant, if his registration is granted as a salesman under any public protection legislation, such as the Act, plays a significant part or assumes a position of responsibility in the business operations of the brokerage business, for the reason that, rightly or wrongly, members of the public may be induced to think they have a right to believe or perceive the registrant is fit and proper to deal with, as a salesman, by the mere fact of registration by the Registrar under the Act.
6. Being aware of the Applicant's past conduct, the Registrar is quite unable or unwilling to expose the public to a risky situation, were he to be registered as a salesman under the Act.

7. The Registrar does not believe that a complaint, whether or not in respect of trade in real estate, should be made to the Registrar by members of the public, or that any complaint is necessary to the determination of an Applicant's entitlement to registration. In the final analysis, it is the Registrar's opinion, supported by facts and the totality of evidence, that ought to be considered for the determination of such entitlement, in the context of the intent and purport of the Act, generally, and of the said sections 6, 8 and 9 of the Act, specifically.
8. Further, the Registrar believes that the burden of proof cast upon him for the reason or reasons given by him previously, is supported by the evidence and the preponderance thereof in discharge of his onus under Section 6 (1)(b) of the Act, which is reproduced hereunder:

"6(1) An Applicant is entitled to registration for renewal of registration by the Registrar except where,

- (b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and integrity and honesty."

(Registrar is underlining for emphasis).

9. If a person, such as the Applicant, is registered, he is likely to be perceived, by the mere fact of registration under such a statute, by members of the public, to be familiar with the provisions of the Act, the regulations of the law, which would lead one to believe that he has, at all times, demonstrably complied therewith. The public perception in the regulatory effect of that Act would be greatly compromised in a situation as the

one herein wherein the Applicant is subject to any or all of the following - imprisonment, parole or probation order.

10. If a person, such as the Applicant, is registered, he is likely to be perceived by members of the public, by the mere fact of registration under such a statute, as having knowledge of any potential or actual detriment to the public interest, which would lead one to believe that he has at all times, demonstrably averted or attempted to avert said potential or actual detriment.
11. The detailed allegations provided herein-before support the Registrar's opinion, reason or reasons that the past conduct of the Applicant does afford reasonable grounds for belief that he will not carry on business with law and with integrity and honesty.

In this case we are only concerned with the relevant facts of the conviction of second degree murder and inferences to be drawn from this. There no issue of any dishonesty or misleading in the application or other documentation submitted by the Applicant, and the conviction for failure to appear in 1976, is of no consequence and the Registrar did not place any reliance upon it in support of his position.

In addition to the facts outlined in the parts of the Proposal quoted above, there are some additional facts which came out at the hearing which are relevant. The Applicant was born in March of 1954, the eldest of nine children; he had to leave school after Grade 9 in order to help support his family of which his father was sole support until that time; his family appears to have been close-knit, hard working, and law abiding, and apart from the circumstances leading to the murder convictions, he appears to have been all of these things as well.

He was particularly close to one younger brother who became enmeshed with trouble with a third man the ultimate murder victim. Following this and apparently as a result thereof, this younger brother committed suicide and bad feeling resulted between the Applicant and this man. On an occasion, this man and the Applicant were quarrelling on the telephone and he asked the Applicant to come down to the store where he worked which,

unfortunately, the Applicant did. The Applicant said that because he was afraid of this man, he put a loaded revolver in his pocket. When he got to the store, the other man invited into a back room and, again he made the mistake of going in there alone with him. The other man attacked him with a knife and he drew his gun and shot him. The Applicant did not attempt to escape and he himself called the police.

Although charged at the time with first degree murder, he was granted bail by a Supreme Court Judge because of the element of self-defense involved, and a general assessment of his character that he would appear at his trial. This belief was not misplaced.

At the trial in April 1981, he was convicted of second degree murder, and the Trial Judge gave him the minimum sentence allowed, namely life imprisonment with an order that he serve a minimum of ten years. While in prison, he appears to have had an unblemished record; he worked hard upgraded his education and succeeded in passing grade 12. Because of good conduct, he passed as rapidly as possible from maximum to medium to minimum security confinement, the last being The Beaver Creek Institution, near Bracebridge. The Applicant says that for years he was interested in going into real estate and he told the Correctional and Educational authorities at Beaver Creek of this desire, and they went through quite unusual trouble and effort to allow him to enrol in the real estate course in Orillia. Doing this involved getting the necessary passes out of Beaver Creek from the National Parole Board, and allowing him to make the necessary travel arrangement.

There is no doubt that the Applicant had to put a great deal more into his taking this course than the average person has to do. In any event, he passed with a mark of 85% and then applied for his salesperson licence as aforementioned.

Unfortunately, when the Correctional and Educational authorities were doing what they thought was their best to assist a deserving inmate to rehabilitate himself, when they came to check out, before he started the course, what view would be taken of his conviction when he came to apply for his licence, they appear to have checked with the wrong people. They communicated with a local Real Estate Board rather than the office of the Registrar. They were told that since the conviction had nothing to do with fraud or any theft related offence, it would not be a problem, and they and the Applicant accepted that. If they had checked properly with the Registrar, they and the Applicant would have known then of the serious problem raised. This could have led either to the Applicant deciding not to make the effort and spend the money to take and pass the course, or to the interviews, inquiries and consideration by the Registrar which might have put him in a

position to deal otherwise with the application.

At the hearing before us, two senior and quite impressive officials came on behalf of the Applicant, Mr. Powell, the Principal of the campus school and Mr. Carleton, a Correctional Services officer. Both of them spoke in the best of terms of the Applicant, told of his excellent conduct and attitude while an inmate, of his extraordinary effort to upgrade himself and urged in the strongest terms which they could express, that he be granted his licence. When dealing with the application and making his Proposal, the Registrar had no opportunity to take into account any considerations personal to the Applicant, apart from what appeared from the application and other papers submitted with it, but he should not be criticised for this because, while he would certainly have granted an interview with the Applicant if one had been requested and would almost certainly have followed up matters arising from it, the number of applications which he receives in the course of a year is so large that he cannot initiate interviews with Applicants, and there cannot be an onus upon him to do so.

Counsel for the Registrar stressed the fact that the sponsoring Broker did not come before us in support of the Applicant, but in this case the Tribunal does not consider this a point of consequence against the Applicant. We assume that the broker would have told us that he was fully aware of the problem and had no hesitation in supporting and employing the Applicant and beyond this, there really is not much he would say bearing on our judgement as to there being reasonable grounds for the Registrar's conclusion.

It is most important to appreciate that the decision which the Tribunal has to make is not whether it would come to the same conclusion or belief as has the Registrar upon the issues, but whether there are reasonable grounds upon which the Registrar could come to the belief and conclusion which he has. Also in considering whether he has such reasonable grounds, we must take into account not only the information which he had on June 1, 1990 when he signed the Proposal, but also all of the other relevant information which we had as a result of this hearing before us. Taking all of this into account in applying the test laid down by Southey J. and followed on numerous occasions by this Tribunal, we are not able to say that Registrar did not have reasonable grounds for his belief. In order to uphold the Registrar, we do not have to go so far as to find what we consider to be conclusive reasons for his beliefs and in order to reverse his decision, we do have to go so far as to find that there are not any grounds to support it.

There are, however, a number of other things which

should be added. I referred at the outset to a general practice followed by the Registrar of refusing to license an Applicant while on probation or parole following a criminal conviction. This practice was criticised by Counsel on behalf of the Applicant as being arbitrary but, as a general rule, the reverse is probably the case. With such a large number of applications annually and such limited facilities for dealing with them, the Registrar appears to us to improve the system by putting in place bench marks, where he can, which are of guidance to Applicants as well as to himself and to the Industry.

However it is obvious, and the Registrar admitted, that this practice or bench mark does not fit the circumstances of this Applicant who will be on parole for the rest of his life. It might be simple to say that once the ten year custodial term of his sentence is passed, this consideration should be put aside but this raises a troublesome question as to the basis upon which it can be considered in connection with this Proposal although not apply after the ten years.

In view of the conclusion as to the disposition of this appeal reached by the Tribunal, we find it sufficient to conclude this point with two observations. The first is that, while the Registrar appears to have had this practice quite cogently in mind in reaching his original conclusion, the Tribunal places no reliance upon it coming to its conclusion aforementioned. The second is that if the Applicant should reapply for his licence after the ten year period has elapsed and if there are no breaches of condition of his parole, the fact then of his being on parole should not be a factor against him. If he makes another application at such time, the Applicant will know that he should have an interview with the Registrar and that he should identify any problems the Registrar has with his application and take all steps available to him to meet them.

A number of authorities were cited to us by both Counsel. In the first of these Grunberg vs. Registrar of Real Estate and Business Brokers, released on February 16, 1990, the Applicant had been convicted of rape and the Tribunal said at page six of the report which we have:

In this appeal, the Registrar has decided to deny to Mr. Grunberg registration as a real estate salesman because of the conviction for rape, the fact of some violence having occurred, and the public perception of the duty of the Registrar to protect the public interest as well as the public concerns which could be expected to

arise by the registering of such a convicted person. The matter of public perception through the registration of an individual has been considered by this Tribunal on several occasions. As set out in the appeal of Ronald W. Northover (1984) 13 CRAT 292:

... the overriding consideration here is the question of policy and the question of public perception of the policies which will be followed and used as guidelines by the various Registrars who are charged with the responsibility of presiding over the various industries all coming within the jurisdiction of the Ministry of Consumer and Commercial Relations.

Two other cases cited were those of Barroso vs. Registrar of Real Estate and Business Brokers, a decision of this Tribunal given on December 13, 1990, and Williamson vs. Registrar of Real Estate and Business Brokers given in June 1987, in which it cites with approval and applies the same passage from the Northover case which I have quoted above. These authorities are of assistance in showing the way in which the Tribunal has applied the principles laid down in the Brenner case to a case as such as this one and, therefore, how it must be applied in this case.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Broker Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant registration.

EMMANUEL GOULART

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
A.D. MANCHESTER, Member

APPEARANCES:

M. STEPHEN GEORGAS, representing the Applicant

DON BOURGEOIS, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF
HEARING: 25 June 1991 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar, Real Estate and Business Brokers, to revoke the registration of the Applicant as a real estate broker. The reasons given by the Registrar for his Proposal are that:

- a) the past conduct of Mr. Goulart affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; and
- b) having regard to his financial position, Mr. Goulart cannot reasonably be expected to be financially responsible in the conduct of his business.

As appears in Exhibit 8, the parties have submitted an Agreed Statement of Facts which are as follows:

The Applicant is registered as a real estate broker under the Real Estate and Business Brokers Act. He was at all material times the sole director, officer and shareholder of Re/Max Homecentre Inc., a provincial corporation.

The company operated from two offices; viz. 1280 Dundas Street West, Toronto and 1278 St. Clair Avenue West, Toronto.

The corporation maintained two separate Real Estate Trust Accounts with the Toronto Dominion Bank, one for each of its offices. The Applicant was the sole signing authority on and had control of both Real Estate Trust Accounts.

On August 20, 1990, the Ministry of Consumer and Commercial Relations conducted an inspection of the books and records of the corporation pursuant to Section 12 of the Act.

Mr. Goulart at that time voluntarily disclosed to the inspector a deficiency in the Real Estate Trust account of the corporation of approximately \$150,000. A summary audit of the trust accounts substantiated this admission. A Director's Direction to freeze the trust accounts was issued on August 21, 1990 to protect customer monies.

An investigation into the affairs of the Applicant revealed that on April 30, 1990, he had removed \$180,000 from his trust account and had used the funds to pay off loans for business purposes. Furthermore, on fourteen other occasions, Mr. Goulart removed monies from the trust accounts prior to the closing dates of transactions, the whole contrary to the terms of his trust.

With the consent of the Registrar, the Applicant found a purchaser or purchasers for his corporation and used the proceeds of sale to make up the deficiency in his trust account. The transaction closed on September 25, 1990 at which time, Mr. Goulart resigned as an officer and director of Remax Homecentre Inc. and relinquished all signing authority over the Real Estate Trust accounts.

The sale permitted the Real Estate Trust accounts to be replenished, minimized the exposure of members of the public to losses, and avoided the termination of over 40 employees of Remax Homecentre.

Mr. Goulart has been employed as an associate broker with Remax Homecentres since September 25, 1990.

There are currently two judgements in favour of Household Realty Corporation Ltd. and Household Trust Company against Mr. Goulart in the amount of \$44,000 and \$11,000 respectively. Mr. Goulart has made arrangements with the companies to satisfy these judgements.

The Applicant was charged on January 10, 1991 with 24 counts of theft and one count of breach of trust pursuant to the Criminal Code of Canada arising out of the deficiencies in the Real

Estate Trust accounts. He entered a plea of guilty to breach of trust and theft charges were withdrawn by the Crown on April 24, 1991.

Mr. Goulart was sentenced on June 12, 1991 to imprisonment for 90 days, to be served intermittently from Fridays 8:00 p.m. until Mondays 6:00 a.m., to commence June 14, 1991, every week-end thereafter until completed. He was also sentenced to probation while not serving custodial service and to report forthwith and thereafter as required.

The probation period ends September 21, 1991.

The first witness to testify was Mr. Gordon Randall, the Registrar of Real Estate and Business Brokers. He stated that the offence by Mr. Goulart was the most serious possible under the Real Estate Brokers Act and went to the very cornerstone of the profession. The root of a broker's registration is the proper administration of his trust account. It is the very essence of what is demanded of a broker. Goulart, he stated, breached this trust and thereby lost his right to be a broker. He could no longer be trusted in an area most vital to public concern. The general public must be able to rely on a broker's honesty.

In cross-examination, Mr. Randall stated that there were no consumer complaints against Goulart.

Mr. Emmanuel Goulart testified as the first witness in his defence. He stated that following the opening of the second real estate office, his business fell into serious economic difficulty. His start-up costs alone were over \$400,000 at a time when the real estate market was beginning to seriously weaken.

When the economy began to fail late in 1989, revenues fell; at the same time his sales staff of 30 could not afford to pay their part of the rent for the premises or their share of advertising expenses. As a result, Mr. Goulart had to pay these expenses without being reimbursed. To do so, he began using trust account money.

After his breaches were discovered, in order to obtain funds to replenish various accounts and protect the public from any losses, he had to give up his home which had been mortgaged to raise funds for the business.

He testified that he had breached his trust account on fourteen occasions.

Finally, he stated that he felt remorseful for the crimes he had committed.

In cross-examination, Mr. Goulart testified that he waited for the Registrar to take action before admitting his problems; that is, he did not make a prior voluntary disclosure of his breaches of trust.

He also testified that he sold the shares of his Corporation at a price which may not have been fair to him, but that was fair in the long run "because I made a mistake for which I had to pay." To allow the sale to take place, Mr. Goulart agreed to invest an additional \$135,000 in September 1991, which amount he is now paying back. The Registrar was not aware of this further sum which Mr. Goulart had to pay in order to allow the sale to be consummated and to protect the public.

The next witness to testify was Marina Tavares, who was an acquaintance of Mr. Goulart. She eventually participated in the purchase of his company. She testified that she was very surprised at his having breached his trust, in as much as she always thought him to be very honest. She believed that he would never commit the crimes again and that is the reason that she was prepared to allow Mr. Goulart to be a real estate salesman in her firm.

In cross-examination, Ms. Tavares stated that she herself would never have taken funds from a trust account even if in very serious financial difficulties.

Elizabeth Whitton, a leasing representative, testified that she has known Mr. Goulart for ten years during which time she brought her first house through him. He also sold her house for her in June of 1991. She stated that she trusted in the honesty of Mr. Goulart and had engaged him to sell the home even though she knew about his breach of trust.

The final witness was Jose Matias, a social worker in the Child Protection area. He testified that he has known Mr. Goulart for nineteen years. He has always found him to be caring and honest. He went on to say that while the Applicant had erred, he believed that he would not make the same mistakes again. He found that Mr. Goulart had shown remorse and concern, both of which reflected a sense of honesty. Beyond this, Mr. Goulart had accepted his responsibility for the acts and ensured that no member of the public was hurt by his behaviour. Rather than declare bankruptcy, he worked to pay off all the debts.

The matter before the Tribunal to decide is whether the Registrar exercised his discretion reasonably in proposing to

revoke the licence of Mr. Goulart as a real estate broker. Is it reasonable for the Registrar to believe that in the future Mr. Goulart will not act honestly, given his past conduct?

On the evidence presented, the Tribunal finds that Mr. Goulart breached his trust account on fourteen separate occasions from February through July 1991. There was, therefore, a course of illegal conduct by the Applicant for an extended period of time, involving a substantial number of breaches of trust.

The Tribunal also finds that Mr. Goulart has shown genuine remorse for his criminal acts and has sought to make amends for them by giving complete restitution of the sums fraudulently acquired. This restitution has been at great cost to the Applicant who has lost his home as well as his business.

Mr. Goulart, therefore, did not shirk his responsibility. Mr. Goulart has also confessed to his crimes before the Criminal Court and is in the process of serving his sentence.

Has the Registrar exercised his discretion reasonably in deciding to revoke the registration of Mr. Goulart as a registered broker? The Tribunal believes that he has. While Mr. Goulart has shown genuine remorse and made full restitution, as a real estate broker he would be required to handle trust money. Based on his past conduct when in financial difficulty, it is not unreasonable for the Registrar to believe that Mr. Goulart might again "dip into" trust funds.

The case law on the preceding points has been consistent.

In the case of Frederick Bullock (1988) CRAT 190 at 194, the Tribunal stated:

On the basis of the foregoing, it is clear that only people who demonstrate that they can fulfil their fiduciary duties should be permitted to become registered as salespersons under the Act.

The case of Israel Jakobs (1987) CRAT 223 is particularly relevant. Mr. Jakobs was convicted on a charge of theft of property exceeding a value of \$200. This occurred when he was in the employ of a jeweller and substituted zircons for diamonds which had been brought by a client for cleaning and polishing. This Tribunal in upholding the decision of the Registrar to refuse registration to Mr. Jakobs, stated at p.226:

However, the Tribunal must weigh the interests of the public against the interests of and sympathy it may have for the Applicant. On balance, the public interest must prevail in this case.

The Tribunal has taken into account that Mr. Jakobs was forthright in disclosing his criminal record in his application and his evident resolve to turn his life around and to make something of it.

A criminal record, of itself, is not necessarily a bar to future registration. However, the offenses for which Mr. Jakobs was convicted showed a very serious breach of trust. Quite aside from the financial loss suffered by the owners of the stolen diamonds, through his actions, Mr. Jakobs placed the reputation of his employer in jeopardy. Only the financial loss is being rectified. An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act. "Integrity and honesty" are not merely words. They are standards that must be met. While the onus is on the Registrar to show that a person is disentitled under the Act to registration in the circumstances such as those before us, the Applicant must establish that his conduct and character will be unimpeachable and that there are no reasonable grounds for belief that he will not act in accordance with these standards.

In the case of Alexander Bodon (1984) CRAT 247 at 257, the Tribunal stated:

But it seems to the Tribunal, that its function and that of the Registrar in the first instance, is not to punish. It is to protect. There are different species of misconduct which different individuals

appear to possess propensities to commit thus setting other members of the public at risk. It is frequently necessary to put the interests of totally and absolutely innocent potential victims at an even higher level of consideration than those of an applicant for registration who, in the criminal sense, has already been punished. This is not easy, especially when the individual the Tribunal sees before it is a palpable person while the ones protected from harm are anonymous members of the vast public at large whom one does not see as specific individuals. It is not easy and it should not be easy. We believe that no effort should be spared in any instance to examine and re-examine every possible way in which fair play and decent consideration can be assured to all the interests in any given problem situation with which the Registrar or later the Tribunal may be faced.

The Tribunal also takes note of the decision of the Supreme Court of Ontario (Divisional Court) in the case of Re Axler & Palmer Limited & Joseph L. Axler (1971-1989), 19 CRAT 196 at page 199 where the Court held:

Counsel in an able and exhaustive argument, inter alia, relied heavily on the fact that no client suffered any loss. Proof of an actual loss is not always the necessary criterion. If the conduct as revealed by the evidence was allowed to continue without strictures and punishment, much of the effect of the pertinent legislation would be lost. Prevention of possible harm to the public is as important as punishment for a fait accompli.

Under the circumstances, therefore, the Registrar has acted reasonably in proposing to revoke the registration of Mr. Goulart as a registered broker. The Registrar's decision might have been different if the licence involved was that of a salesman and if the Applicant had waited until the completion of his sentence before applying for registration. At the present time,

however, the matter concerns the revocation of a real estate broker's registration and the Applicant has not completed his sentence.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

SHAHAN GULER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REINSTATEMENT OF REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
SELWYN CHARLES, Member
JAMES A. CATHCART, Member

APPEARANCES:

MICHAEL BADER, Q.C., representing the Applicant

GAIL MIDANIK, representing the Registrar under the
Real Estate and Business Brokers Act

DATES OF

HEARING: 18, 25 November 1991

Toronto

REASONS FOR DECISION AND ORDER

Shahan Guler ("Guler") was first registered as a real estate salesperson on May 5, 1973 and he has continuously remained employed through 18 years and six brokerages with regular renewals of his registration being granted. In fact, he alternated through ten separate periods of employment of which several were with the same employers.

On June 3, 1990, Guler completed an application for renewal and he answered "No" to question 6 on the application which asks:

Have you ever been convicted or found guilty of an offence under any law or are any charges now pending? If yes, attach full particulars on a separate signed and dated statement.

NOTE: Where the applicant has been previously registered, list only those convictions which have occurred since the date of last filing.

On January 8, 1991, the Registrar of Real Estate and Business Brokers issued a Notice of Proposal to refuse renewal of Guler's registration for two reasons which can be summarized as follows:

- (1) that on his first application of May 3, 1973, Guler did not disclose that he had a conviction under the Criminal Code in that he did indecently assault a female person on November 16, 1968; for which event of unwanted touching, he received a suspended sentence and was placed on probation for one year.
- (2) that on his current application, Guler again answered "No" to the current similar question, when a search showed that he had been charged again with a sexual assault of a female person on June 24, 1989; which charges were stayed on May 23, 1991 by order of Judge Rogers.

The Registrar would deny renewal of registration to Guler pursuant to his powers under Section 6(1)(b) of the Real Estate and Business Brokers Act because of:

the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Randy Persaud is a registration officer who learned of Guler's criminal record and then wrote on July 25, 1990 to Guler requesting full disclosure. Guler's reply of August 2 stated that he had misread the question on the current application and he acknowledged the charge of June 24, 1989. No mention was made of the 1968 conviction. Guler stated:

As your records will indicate, I have been an active real estate salesperson/manager for over 17 years, to the best of my knowledge no complaints have ever been filed against me. Once again I would like to apologize for any inconvenience caused. The error was purely accidental and not intentional.

On August 29, 1990, Guler's solicitor wrote to the Registrar to explain the recent charge as follows:

... Mr. Guler was charged with the offence of sexual assault with the date of the alleged occurrence being Saturday the 24th

day of June 1989. It is alleged that Mr. Guler was standing next to a girl in a crowded elevator at Terminal 1 Pearson International Airport. While standing next to this girl it is alleged that Mr. Guler placed his hand under the girl's dress and moved his hand in the area of her vagina. It is further alleged that the girl will testify that Mr. Guler left the elevator when it reached the third floor and he had no further contact with her.

On June 30, 1989, the accused, Mr. Guler, was arrested and charged with an offence. He was released on a promise to appear and did appear when required to set a date for trial.

I attended with Mr. Guler on the date to set a date for trial and a trial date of the 2nd day of November 1990 has been ordered by the Court. Mr. Guler elected to be tried by a Court composed of a Judge and Jury and the proceedings on the 2nd day of November 1990 will be by way of preliminary hearing.

I would stress that the facts set out herein are at this particular time mere allegations, as no evidence has been called at the preliminary hearing or at trial.

Mr. Guler denies the alleged assault and intends to plead not guilty at his trial, which will be some time subsequent to the preliminary hearing to be held on the 2nd day of November 1990.

A meeting with the Registrar and Guler took place on September 26, 1990 with Persaud present, and no comment was made by Guler about the 1968 event said Persaud. On being questioned, Guler stated that he thought that it had been "wiped off".

Gordon Randall is the Registrar of Real Estate and Business Brokers and stated his opinion that Guler was not forthright in his answer on his current application concerning pending charges and had omitted in his first application in 1973 any reference to the criminal conviction of five years earlier. In addition, the nature of the 1968 offence and of the alleged 1989

offence was similar in that they both were said to involve unwanted touching of a female person in a public place.

Since consumer protection is of paramount importance to the Registrar, he believes that Guler's failure to fully disclose these two events makes him unacceptable as a real estate salesperson. The Registrar's opinion was not changed by the staying of the 1989 charges due to the delay in the matter coming on for trial. He believes that Guler had several opportunities to disclose and had to be prompted to finally respond fully. The Registrar is not aware of any other complaints of any kind against Guler since 1973.

Even though the conviction of 1968 is some 23 years ago, the Registrar believes that failure to disclose it in 1973 and the failure to disclose pending charges in the current application are sufficient to deny renewal of Guler's registration. Since the Registrar must ordinarily rely fully on the answers in an application, he believes that the highest level of honesty in completing all answers must be expected from all applicants.

Shahan Guler is now 48, and came to Canada from Istanbul, Turkey in May 1968 when he was 25 years old. He has a grade 12 education and is of Armenian heritage; and did his military service in the Turkish navy. A Canadian citizen for 11 years, he has been married for 21 years and has two grown children: a daughter now in university and a son in grade 11. He also supports his mother who is now in Canada. For the past 15 years, he said that his income from real estate ranged from \$60 to \$100 thousand dollars annually. There have not been any ethics, financial, trust or client conduct charges against him and his sole income is from his very active and successful real estate practice. He and his wife own their own home and she is employed with All State Insurance Company. He said that he knew no English on arriving in Canada and the 1968 conviction occurred when he had been here less than six months. There was no violence or sexual misconduct he said, but an "uninvited touching" which had taken place.

After the plea of guilty and sentencing, Guler said that he went to a probation officer on three occasions and was told then to go on to school and carry on with his life. By 1973, he had moved from being a salesman trainee in a Bata Shoe Store to assistant-manager, then manager, and finally supervisor of 21 stores. He said that the conviction was not mentioned in his 1973 application due to the probation officer's inference that the event was over and his record was cleared. No mention was made of the subsequent applications as none had to be.

With respect to the current application, he said that he had misread the question as to pending charges since he believed himself not guilty of any offence.

Guler reviewed his professional activities since joining the Toronto Real Estate Board in 1973. He became Chairman of the Toronto Executive Business Club in 1981 and was elected a member of the Executive Council of the Board's Sales Division in 1987 and 1988, after which he was Vice-Chair in 1989 and Chair in 1990 and 1991. He is active in provincial and national organizations, and has served on several other committees, and has been a delegate to several assemblies and conventions both provincially and nationally.

He has created a successful RRSP pension fund for salespersons with the Toronto Real Estate Board after five years of efforts and has also built up a soccer league in Willowdale which now involves 400 youth. Guler filed with the Tribunal 12 letters of support from lawyers and other realtors, as well as a letter of commendation directed to "Ms. Shahan Guger" from the Prime Minister for his involvement with a political financial support group.

On cross-examination, Guler stated that the 1968 event occurred with a young woman not known to him in Eaton's store in Toronto. He has not made an application for a pardon of this conviction. He agreed that the meaning of "pending" is clear, that his knowledge of complex language and documents is good, and that as a prominent person in his business life, he should be a role model for others.

Four character witnesses appeared on Guler's behalf; of whom three also presented letters of reference.

Jack McGee is a lawyer in sole practice who has his office close to Guler and who shares with him a common interest in professional sports. He has a busy real estate practice and has done much work with clients of Guler. He stated that he had never heard of a complaint against Guler in any real estate matter, that he is a friend of Guler, and that on reading question 6 in the application Guler's answer should have been "yes", but that this was an honest mistake.

John England has been a real estate salesperson for eleven years, is a Director of the Toronto Real Estate Board and has known Guler for six years. He has had no direct business dealings with Guler and believes that Guler's reputation is one of honesty and integrity. He now knows of the events of 1968 and 1989 and his opinion of Guler has not changed. He believes that Guler

is highly respected by fellow salespersons due to his activities on the Toronto Real Estate Board where he actively supports their interests.

William Boyle is now a real estate salesperson and knew Guler for more than 15 years in the Masonic Lodge and while Boyle owned a gasoline service station business. Guler acted for Boyle on business and personal purchases and sales, and Boyle is greatly impressed by his knowledge and his family life. Boyle has no reservations about Guler as a friend.

Rodney Halcrow, President of Re/Max Elite Realty Ltd. is Guler's sponsor in the 1990 application, and employed Guler from August 16, 1986 to October 26, 1988, from September 9, 1989 to January 25, 1990, and since May 24, 1990.

He has been sixteen years in real estate and employs 102 salespersons. He believes that Guler is a first class individual in every way and has never had a problem with him. Guler's office conduct is exemplary and his reputation with others is high. There has never been any concern of Guler being with female clients or other salespersons or staff.

He has known of the two events of 1968 and 1989 for the past week, and believes that the first event is far too remote for a young immigrant to be of any concern today. Since the second item was stayed and will not proceed, that also is over for Halcrow. While Halcrow would be concerned if Guler had been convicted of the 1989 event, he just doesn't believe the allegations to be true. To Halcrow, Guler is a very valuable salesperson and he would abide by terms and conditions of registration if the Tribunal so ordered.

Counsel for the Registrar reviewed the five reasons upon which the Registrar based the decision to refuse renewal of registration to Guler. These are:

1. the 1968 conviction;
2. the failure to disclose that conviction on the 1973 application or on later renewal applications;
3. the failure to disclose the pending charges on the 1990 application;
4. that when asked about the two events, only the latter was admitted; and

5. the many chances Guler was given to disclose both events.

The Tribunal was referred to the decision of Alin Kader (1990) 20 CRAT 493, when a non-native Canadian with language facility had registration on two occasions during a five year period with two terminations, a reinstatement and a suspension. On a further application in 1989, he answered the question 6 with a "No", but the withdrawal by his sponsoring broker ended that application. A further application saw question 6 answered by "Yes" and the Registrar proposed to refuse registration due to non-disclosure. The Tribunal concluded "that again we cannot say that the Registrar is incorrect in refusing registration renewal at this time to Mr. Kader."

Also, the decision of Patrick Doherty (1989) 18 CRAT 268 was cited where the Registrar's decision to refuse Doherty's first application for registration was again upheld when four pending charges for cocaine possession and trafficking were not disclosed and where Doherty was on probation for a former conviction.

Counsel noted the character evidence given in person and by letter on Guler's behalf, as well as the support of his supervising broker, his community and professional service and the fact that no consumer complaints on real estate issues have ever been recorded against him over an 18 year career. She concluded that the Registrar has reasonable grounds upon which to refuse renewal of registration and therefore should be upheld in his Proposal.

Counsel for Guler acknowledged that his task was to show that the Registrar was in error in this Proposal. He believes the proper weight has not been given to a successful career of more than eighteen years and to the professional and community leadership taken on by Guler. There is no evidence of any improper behaviour in a real estate setting or of any consumer complaints of any kind. The support of Guler's sponsoring broker is strong and the proposed penalty is an effective sentence of professional death for an offence of non-disclosure of the 1989 charges, as the 1968 conviction undisclosed in 1973 or since is too far removed to be a fair matter upon which the Registrar can rely. A benefit should be given in his opinion to the applicant with an established career compared with a new applicant as any risk to the public can be more clearly considered.

In this appeal, the Tribunal has concluded that the Registrar is in error to refuse to renew Guler's registration. In this appeal, the penalty is too severe for the offence of failing to disclose a pending charge. The Tribunal has concluded that in

this case any reliance on an event in 1968 not disclosed in 1973 is too far removed from today to form a fair basis for a decision which will have such drastic results. As the Tribunal has consistently supported the principle of disclosure to the Registrar, we believe that a penalty for failing to disclose in this situation is appropriate.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to refrain from carrying out his Proposal, and to renew the registration of the Applicant; however, that renewed registration will be suspended for a four month term commencing February 1, 1992.

STANLEY HALL

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL:

JAMES R. BREITHAUPT, Q.C., Chairman, presiding
J. BEVERLEY HOWSON, Member
A. DONALD MANCHESTER, Member

APPEARANCES:

THOMAS HICKS, representing the Applicant

BEVERLY WISE, representing the Registrar under
the Real Estate and Business Brokers Act

DATES OF 29, 30, 31 May 1991

London

HEARING: 12 June 1991

Toronto

REASONS FOR DECISION AND ORDER

Stanley Hall ("Hall"), 36, of 1325 Fuller Street in London first applied on May 2, 1985 to become a real estate salesman. That registration was renewed in an application made April 22, 1987. Upon registration having lapsed, a further application to be registered was made on August 30, 1990 and reviewed on September 12, 1990, and the Registrar issued a Notice of Proposal to refuse registration (FIRST) on October 19, 1990. Notices of Further or Other Particulars followed on February 26, 1991 (SECOND) and on May 7, 1991 (THIRD).

From these three Notices, the issues raised by the Registrar as to why Hall should be refused registration are as follows as set out in each Proposal and by paragraph:

ISSUE 1 - In the first application of May 2, 1985, Hall checked the block marked "Yes" for question 4(b) which states:

Have you ever had a licence or registration of any kind refused, suspended, revoked or cancelled? If yes, give full particulars. NOTE: "Of any kind" includes driver's licence, or any other licence, permit or registration issued by any government body.

Hall wrote in "1975 unpaid fine". and no further particulars were provided.

(FIRST, paras 1 and 2)

ISSUE 2 - In that first application, question 7 states:

Have you ever been convicted under any law of any country, or state, or province thereof, of an offence, or are there any proceedings now pending? If yes, give full particulars of all such convictions and proceedings on separate sheet. NOTE: Where the applicant has been previously registered, list only those convictions which have occurred since the date of the last filing. You are not required to disclose any conviction in respect of which a pardon has been granted.

Hall again checked the box marked "Yes" and wrote "possession of pot". A handwritten note dated May 2, 1985 was attached which stated: "I was convicted in 1982, for possession of pot. I am not sure of the month. That is my only conviction since I was registered as a certified life underwriter. Conviction took place in London, Ontario."

(FIRST, para 3)

ISSUE 3 - On the application of April 22, 1987, Hall answered question 4(b) by checking the box marked "No".

(FIRST, para 5)

ISSUE 4 - On the application of April 22, 1987, Hall answered question 7 by checking the box marked "Yes" and wrote "ON RECORD". No further particulars were provided.

(FIRST, para 6)

ISSUE 5 - On the application of August 30, 1990, question 2 states:

Provide particulars of occupation during the past 3 years (including periods of unemployment, illness, school, etc.)".

Hall answered this as follows:

Name & Address of Employer
Re/Max Forest City Reality (sic) Ltd.
334 Wellington Road South
London, Ontario

Type of work/Position
Real Estate Salesperson

Period of Employment
From: 90/03/20 To: present

In fact, "90" was an error and should have been "89". The Registrar states that Hall was employed from the date of the lapse of his registration on May 27, 1989 to September 1990 as a real estate salesman when he was not registered.

(FIRST, paras 7, 8 and 9)

ISSUE 6 - From the application of August 30, 1990, question 3(b) states:

Have you ever had a registration of any kind refused, suspended, revoked or cancelled? If yes, attached particulars.

Hall answered this by checking the box marked "No".

(FIRST, para 7)

ISSUE 7 - Question 4 on the application of August 30, 1990, states:

Has the applicant ever been involved in any bankruptcy proceedings?

Hall checked the box marked "Yes" and attached a copy of the Assignment in Bankruptcy dated June 21, 1990. A list of twenty-six non-business creditors was received later; and the total of debts owed by Hall and his wife Lily Mary Marlene Hall was \$190,401.22. As an undischarged Bankrupt, the Registrar questions the financial responsibility of Hall. (FIRST, paras 11, 13, 14, 15)

ISSUE 8 - Question 6 on the application of August 30, 1990, states:

Have you ever been convicted or found guilty of an offence under any law or are there any charges now pending? If yes, attach full particulars on a separate signed and dated statement. NOTE: Where the applicant has been previously registered, list only those convictions which have occurred since the date of last filing.

In answer, Hall checked the box marked "Yes" and wrote in "Speeding Ticket", and no further particulars were provided to the Registrar.

(FIRST, para 12)

ISSUE 9 - A search of Hall's driving record showed the following convictions:

<u>Date of Conviction</u>	<u>Description of Offence</u>
74/04/29	Drive while disqualified/ Criminal Code
74/04/25	Drive while disqualified/ Criminal Code
81/01/29	Disobey amber traffic light

81/08/26	Speeding 80 in 60 KMH
81/12/22	Fail to stop at intersection
82/03/09	Speeding 65 in 50 KMH
82/07/13	Speeding 70 in 50 KMH
82/12/03	Unsafe move
83/06/15	Speeding 140 in 100 KMH
87/02/13	Disobey traffic sign
87/05/05	Fail to produce driver's licence
87/05/27	Fail to produce driver's licence
87/05/28	Fail to have insurance card
87/05/28	Fail to produce driver's licence
87/09/08	Speeding 111 in 90 KMH
87/11/26	Speeding 67 in 50 KMH
88/04/25	Speeding 122 in 100 KMH
88/05/04	Speeding 70 in 50 KMH
89/07/25	Passing vehicle on right

(FIRST, para 16)

ISSUE 10 - A search of Hall's criminal record showed the following convictions:

<u>Date & Place</u>	<u>Charges</u>	<u>Disposition</u>
Dec. 5 72 London	(1) Threatening Sec. 745 CC (2) Theft of Auto Sec 294 CC (3) ATT B & E With Intent Sec 421(b) CC (3 chgs)	(1-5) Susp sent and Probation for 2 years on each chg conc 6) Fined \$50 i/d 7 days consec 7) Fined \$75 i/d

- (4) B & E With Intent Sec. 306 (1)(a) CC . . . 7 days consec
- (5) BE & Theft Sec. 306 (1)(b) CC (5 chgs)
- (6) Common Assault Sec 245 (1) CC
- (7) Assault CBH Sec 245 (2) CC

Sept 25 73 Sault Ste. Marie	Obstruct Peace Officer Sec 118 (a) CC	2 days
Sept 28 73 London	Breach of Probation Sec 666 (1) CC	14 days
Apr 29 74 London	<ul style="list-style-type: none"> 1) BE & Theft Sec 306 (1) (b) CC 2) Breach of Probation Section 666 (1) CC 3) Drive While Disqualified Sec 238 (3)(a) CC (2 chgs) 	<ul style="list-style-type: none"> 1-2) Susp. sent & probation for 2 yrs. on each chg 3) Fined \$50 i/d 7 days on each chg
Mar 11 81 London	Poss Of A Narcotic For the purpose of Traffic- king Sec 4(2) NC Act	1 day & \$800 i/d 3 mos.
Oct 19 82 New West- minster BC	Poss Of a Narcotic For The Purpose of Traffic- king Sec 4 (2) NC Act	8 mos
Jan 14 83		PAROLED

(FIRST, para 17)

ISSUE 11 -

As a result of information provided in the Applicant's driving record and criminal record, the Registrar concludes that the Applicant failed to disclose on all three applications for registration submitted by him, the details of an extensive Highway Traffic Act record as well as a Criminal Code record, including a term of imprisonment.

(FIRST, para 18)

ISSUE 12 - A conditional discharge from bankruptcy was granted to Hall on November 2, 1990, on the following terms:

THAT the bankrupt pay to the Trustee the sum of two thousand dollars (\$2,000) or that the bankrupt consent to judgement in that amount.

The Registrar asserted that payment of the \$2,000 has not been made, and that Hall has admitted that his bankruptcy was caused by compulsive gambling and through the irresponsible use of credit.

(SECOND, paras 1, 2, 3, 4)

ISSUE 13 - While Hall was registered as a life insurance agent on July 27, 1982, he had not disclosed his criminal record at the time so the licence granted was a probationary one. As of December 6, 1982, Hall's employer terminated his employment on the basis that Hall had resigned. In fact, Hall was imprisoned in British Columbia from October 19, 1982 to January 14, 1983.

(SECOND, paras 5, 6, 7, 8 and 9)

ISSUE 14 - In a faxed application for registration sent on February 26, 1991, Hall responded to question 3 by marking the box "Yes" and writing in "Life Underwriter". Question 3 states:

Are you registered or have you ever been registered, under this or any other Acts?

That application was sent following the withdrawal of the sponsoring broker who had completed the application of August 30, 1990. The Registrar asserts that Hall was registered as a life insurance agent at one time, but is not a life insurance underwriter; as was also alleged in Hall's very first application of May 3, 1985.

(THIRD, paras 10, 11, 12 and 13)

ISSUE 15 - In the application of February 26, 1991, Hall answered question 5 by marking the box "No". Question 5 states:

Are there any unpaid judgements outstanding against you?

The Registrar asserts that three outstanding judgements are registered with the Sheriff of Middlesex as follows:

1. Writ of Seizure and Sale in favour of Canada Trustco Mortgage Company in the amount of \$25,684.23 dated May 31, 1990;
2. Writ of Seizure and Sale in favour of Forest City Plymouth Chrysler Ltd. in the amount of \$1,689.50 dated March 11, 1988;

3. Writ of Seizure and Sale in favour of Household Realty Corporation Limited in the amount of \$20,497.41 plus costs and interest dated April 11, 1991.

(THIRD, para 14)

ISSUE 16 - As a further undisclosed judgement, the Registrar asserts that Hall has signed a judgement in favour of the Trustee in Bankruptcy for himself and his wife in the amount of \$2,000, and that the judgement has not been paid.

(THIRD, para 15)

ISSUE 17 - In answer to question 6 on the application of February 26, 1991, Hall checked the box marked "Yes", and wrote in "Speeding tickets". Question 6 asks:

Have you ever been convicted or found guilty of an offence under any law or are any charges now pending?

The Registrar asserts that:

In light of Hall's continuing failure to disclose his extensive driving and criminal record, as more particularly set out in the Registrar's proposal of October 19, 1990, it is the Registrar's opinion that the Applicant's response to question #6 constitutes a continuing failure to disclose his complete criminal and driving record as required by the Act and Regulations.

This answer was repeated in a further application of February 27, 1991.

(THIRD, paras 16 - 22)

ISSUE 18 - This concerns a consumer complaint as follows:

The Registrar has learned that a complaint was made by one Carol Fuller against the Applicant. The complaint was the subject matter of an Ethics Committee hearing before the London and St. Thomas Real Estate Board held on April 5, 1990.

The Applicant was found guilty of violating Article 2 of the Standards of Business Practice under the Constitution and By-laws of the London and St. Thomas Real Estate Board in that he did not "advance and promote the interests of those engaged in real estate...." He was fined \$500 in failing "to increase public confidence in and respect for those engaged in the calling of the real estate broker.

(THIRD, paras 23, 24)

ISSUE 19 - This concerns a telephone call to the Office of the Minister of Consumer and Commercial Relations as follows:

On or about October 3, 1990, the Applicant telephoned one Greg Harkins, Special Assistant to the former Minister of the Ministry of Consumer and Commercial Relations, Peter Kormos. The Applicant communicated to Harkins that he was in a desperate state as a result of the refusal of his real estate licence. While not overtly threatening to take action, the Applicant indicated that he might take hostages in Toronto.

As a result of the Applicant's reference to hostage taking, Harkins informed the Investigation and Enforcement Branch of the Ministry. The London Police Department was advised of the Applicant's alleged threat and as a result of its investigation no further action was taken.

(THIRD, paras 25 and 26)

Accordingly, the Registrar asserts that Hall should not be registered because pursuant to Section 6(1)(a) and (b) of the Real Estate and Business Brokers Act, R.S.O., 1980, chapter 431:

(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

Marion Hetherington is a registration officer with the Ministry and first became involved with Hall following a request in May 1990 from Re/Max Forest City Realty Limited under the Freedom of Information Act. That corporation asked for a list of its own sales employees. This curious request brought a response which said that a list from them could be checked. The list was sent and four unregistered persons were discovered, including Hall. The other three had each been unregistered for more than two years. Following an office inspection, a report on August 27, 1990 confirmed that Hall had been in the realty business since his earlier registration lapsed on May 27, 1989 (Issue 5). He was directed to cease business and send in a new application which was done as of August 30. This was said to be an innocent error made on his transfer from an earlier employer.

That application and his two earlier ones were reviewed by Ms. Hetherington. Bankruptcy was acknowledged without details

(Issue 7) and while the question concerning unpaid judgements was answered "No", in fact there were several, she said (Issue 15).

Her concerns about the bankruptcy were met with a delivery by courier of the Assignment and of a list of creditors. That was received on September 14, and on September 19, she spoke with Hall to inform him of the Registrar's general rule of not approving any undischarged Bankrupt (Issue 7). Since question 6 on the application was answered "Yes", a police record search was ordered and the results were of concern to her (Issue 10), since disclosure had not been made then, earlier or later (Issues 1, 2, 3, 4, 8, 11, 13, 17).

Hall's driving record was obtained which showed a substantial list of convictions (Issue 9) which had not been disclosed (Issues 1, 2, 3, 4, 8, 11, 17).

She then reviewed the record of indictment for trafficking in marihuana against Hall and another for which a conviction resulted in an eight month sentence. This related to the disclosure issue set out above as well as particularly to Issue 13. In the matter of the outstanding judgements (Issue 15), she agreed that the first and second had been removed from the Sheriff's records.

The difference between a life insurance agent and a "chartered life underwriter" were reviewed and while there may have been some inaccuracy in Hall's understanding of the terms, she saw in his repetition of the phrase, a course of conduct which was deceptive (Issues 2 and 14).

These various issues were reviewed with Gordon Randall, the Registrar. Jeff Chapman, the sponsoring broker of the August 30, 1990 application phoned her on September 18 and she spoke with Hall the next day. Hall came in for a meeting on September 26; and he explained to her that the bankruptcy was due to the expenses of his father's final illness and visits to British Columbia to settle the estate. When asked if he had ever lived out of Ontario, Hall said "No"; and Ms. Hetherington knew about his incarceration there as he spoke. She stated that she now knows the real cause of the bankruptcy (Issue 12).

At the meeting, the consumer complaint matter was reviewed (Issue 18). On September 27, the Registrar instructed Ms. Hetherington to begin preparation of a Notice of Proposal to refuse registration and this was issued on October 19, 1990. She gave evidence as to her knowledge of Hall's further contacts by many telephone calls with Duncan Brown, the Director of Business Practice; Mrs. Elaine Guggins, the General Manager of the real

estate office, and with Greg Harkins, a Special Assistant to the then Minister, Hon. Peter Kormos.

She spoke of the withdrawal of Jeff Chapman as sponsoring broker in February 1991, when he was informed that his attendance would be expected at the hearing before this Tribunal planned for February 28, 1991.

An application sent by Fax on February 26, 1991, showed a new sponsor in John Baldassaro so that the Tribunal's jurisdiction could continue to hear this appeal. On Baldassaro's withdrawal, another application was received on February 27, 1991, sponsored by Anna T. Boersma of Title Real Estate Corporation.

Ms. Hetherington's final connections with Hall were her knowledge of an enquiry from the Premier's office in this file and her knowledge that Carol Fuller did not wish to be a witness in this hearing (Issue 18).

On cross-examination, Ms. Hetherington could not say why Re/Max Forest City Realty Limited would seek a list of their own staff members. In the result, the other three unlicensed persons had to requalify because their licenses were beyond the two year limit. They would also have to take the mandatory courses now necessary to renew their licenses two years hence (1992). She confirmed the Registrar's policy of not approving an undischarged Bankrupt for registration and stated that she had told Hall to resubmit an application after his discharge when a more favourable result could be expected.

On a review of the initial probationary licensing of Hall as a life insurance salesman on July 19, 1982, she could not say whether or not his five previous convictions had been discounted or even referred to (Issue 13).

In her opinion, full disclosure had not been made by Hall of his criminal and driving records all along the path of the five real estate applications, and the Registrar's office should be able to rely without question on the contents of an application with correct answers so that further searches are not required.

The major concerns she had about Hall were his undisclosed criminal and driving records (Issues 1, 2, 4, 8, 11); the length of those records (Issues 9 and 10); the reasons for his bankruptcy (Issues 4 and 12); and the outstanding judgements (Issues 12, 15, 16).

Mrs. Elaine Guggins is the Registrar of seven Statutes and was the General Manager of the Real Estate and Business Broker

office from January 2, 1990 to March 18, 1991. The Freedom of Information request by Re/Max Forest City Realty Limited went to her and led to the review of their own staff members. Ms. Wilkins in the London office did the inspection on August 10, 1990 and reported on August 27 that the trust records were in order and that four unregistered salespersons had been discovered and the Broker was warned to have them cease trading (Issue 5). In speaking with Hall on September 10, she confirmed that such a lapse in a person's registration is not uncommon and can be cured usually with the routine approval of a new application if done within the two year time allowance.

When Hall spoke of his bankruptcy, she gave the Registrar's policy to him (Issue 7) and told him to send in the application in any event. The other three persons repeated certain courses and were registered. She was available to meet with Hall on September 12, but Mrs. Hall was in hospital and he could not keep that appointment.

Greg Harkins became a Special Assistant to the Hon. Peter Kormos, Minister of Consumer and Commercial Relations in early October 1990 with the responsibility of doing constituency and other administrative work. Hall called through and Harkins was uncertain just how to help, but would try to assist. Hall said that he could not get through to the Registrar; that his licence had expired and revival was refused "over some parking tickets". A meeting with the Minister was requested by Hall. The Registrar was spoken with and the Minister was informed about the bankruptcy and the appeal to this Tribunal so that no intervention would be appropriate.

The next day Hall called again and was becoming angry as Harkins repeated his view that intervention could not occur. On the third call, Harkins just happened to pick up the phone and Hall complained of no funds and a hungry family, and that he may come to Toronto to "take hostages" in an Oka-type situation (Issue 19). Harkins was concerned and spoke with the Executive Assistant to the Deputy Minister who advised informing David Andrew, a Ministry Investigator, who in turn contacted the London City Police about the event.

While more telephone messages kept coming in, Harkins did not speak with Hall again. On cross-examination, Harkins said that he had heard about Hall's many telephone calls to other offices.

David Staines is a seven-year member of the London City Police Department and he received Andrew's call on October 4, 1990 when Harkins' complaint was reviewed (Issue 19). Staines met with Hall in the early evening of October 5, and Hall claimed that he

had been misunderstood. Hall said to him that on going to Toronto that he "could put up barricades as at Oka and hold himself hostage". Hall was angry and upset and Staines warned him to use more careful language. After reporting back to Andrew, no further action was taken.

Mrs. Lynn Coupland is the Administrative Assistant at the London and St. Thomas Real Estate Board responsible for the operation of the Ethics Committee of that Board.

She reviewed the complaint of Carol Fuller (Issue 18). The 1,500 member Board receives some 15 to 20 complaints each month of which 2 or 3 go to the hearing stage. A form letter is used in reply and copies go to the agent and to the broker. A reply is requested within 10 days and after investigation, a hearing can occur. She spoke with Carol Fuller and after the hearing of April 5, 1990, Hall was found to be guilty of having threatened Carol Fuller when she refused to allow him to show in 45 minutes her apartment to a prospective buyer of a building. On her refusal, she stated in her complaint that Hall "dishevelled and unshaven" screamed and ranted at her, and said he would buy the house himself and evict her. A witness was present who also gave evidence at the hearing. The Ethics Committee fined Hall \$500 for this event which sum was paid.

Jeff Chapman is a co-broker/owner of Re/Max Forest City Realty Ltd. and, after twelve years in the business became the majority shareholder of the company on May 1, 1989. Hall came to this office on March 22, 1989 from a Canada Trust office (Issue 5). In February 1990, Chapman sought to get a list of his own registered staff persons to perfect his records and had his partner Bill Warder call for this.

On his return from holidays, Chapman was informed of the results of the office inspection of August 15 by Miss Jane Wilkins which was described earlier by Ms. Hetherington. Chapman offered to help Hall have his licence renewed and the new application of August 30 was completed. Hall had told Chapman about his bankruptcy in June, but the actual cause was not revealed (Issue 12).

Chapman reviewed the Notice of Employee Change form which had been sent in to be effective as of March 22, 1989. On transfer, he noted that a new pocket certificate would be issued and stated that the renewal notice may have gone to Canada Trust and not have been sent on so that Hall could have thought his transfer was effectively a renewal also. He stated that these forms come addressed to the salesperson usually at the business office and that such mail is not opened by the office staff. Now

with 74 commission salespersons on staff, Chapman keeps a reminder date list to avoid any lapses in registration.

Chapman had concerns about Hall although he did represent him at the Ethics Committee hearing about Carol Fuller (Issue 18). Chapman told Hall how serious such an event can be for the image of the office, as well as for Hall personally and gave him a warning letter on November 13, 1989 which Hall signed to confirm that any further such event would lead to immediate termination.

There was also the matter of an arbitration issue concerning the appropriate sharing of a commission where a property was delisted and then sold. At the referee stage, the other party withdrew but the event was a concern to Chapman.

Finally on October 1, 1990, Chapman fired Hall because of these two events, low production, no outstanding transactions, overdue administrative fees and the delay in receiving his registration. This was followed by a letter to the Registrar on February 25, 1991, rescinding sponsorship for the application of August 30, 1990; which led to the two further applications being created.

On cross-examination, Chapman did not recall just when he became aware of Hall's criminal record but it was not likely before August 30, 1990 (Issue 10). Chapman had no question as to any issues of Hall's honesty and integrity and found his clients' satisfaction level and his knowledge of the business satisfactory.

Bill Warder is the other co-owner of Re/Max Forest City Realty Ltd. and became a salesperson in 1982 and a broker in 1984. He is responsible for the office administration and was present at the inspection of August 15, 1990. He informed Hall of the serious situation of being unregistered and had him turn over his work inventory to another and have any lawn sign tags changed (Issue 5). When told of the Carol Fuller incident (Issue 18) on the following day, he discussed the matter with Chapman and was concerned about trying to defend a situation which appeared indefensible. He would not hire Hall today and agreed with the evidence of Chapman.

On cross-examination, Warder said that the office policy was to assist any staff members with financial or bankruptcy problems. An individual's record with projected closings would be reviewed and the person might be carried on salary for from one to six months.

Tim Carson is a Vice-President of the accounting firm of Peak Marwick Thorne and is a Trustee in Bankruptcy since 1984. He assumed the Hall file from another in the London office and

completed the Trustee's report for both Hall and his wife, Lily Mary Marlene Hall (Issue 7, 12, 16).

Their unsecured debts were \$190,401.22 and Carson found that the causes of bankruptcy were:

Stan Hall - compulsive gambling - misuse of credit.

Lily Hall - co-sign debts of husband, was not aware of extent of gambling.

He noted that the bankrupt Hall "has brought on his financial difficulties due to the fact that he was a compulsive gambler and neglected his financial affairs" and saw this as a circumstance which would justify the Court in refusing an unconditional order of discharge.

Hall sought an early discharge hearing in order to get his real estate licence application cleared up, and there was a 1989 Income tax rebate cheque expected for Lily Hall in the amount of some \$1,100.

As any Income Tax or other refund is an asset of the Bankrupts' Estate, Carson expected that the funds would be sent on to him when received.

When he enquired on February 15, 1991, he found that a cheque had been issued to Lily Hall for \$1,180 on December 18, 1990, and had been cashed. Both Stan and Lily Hall were discharged from Bankruptcy respectively on November 26 and November 2, 1990 (Issue 12) and the term of payment by Hall of \$2,000 has not been met. Carson said that the Estates are not wound up until a further year passes and while Revenue Canada could arrange to recover the \$1,180 from any future income tax credit balances, he would just have to wait for any payment of the \$2,000 which, Hall had suggested to him, would not occur until there was "a cold day in Hell", as Hall had no means to pay.

On cross-examination, Carson stated that Hall's excuse in having the cheque cashed to cover Christmas 1990 needs was not acceptable. Hall wanted assistance in arranging an early discharge hearing from Carson and the failure to pay in the Income Tax rebate was an affront to Carson. Carson said he had told Hall that the cheque should be sent and that Hall could not use the money or repay a balance later.

Gordon Randall has been the Registrar of Real Estate and Business Brokers since July 1988 and had more than 20 years of experience as a broker, Board President, teacher and member of

professional organizations. He noted that reminder notices for licence renewals are sent out with 60 days notice and they are label addressed to the salesperson and usually go to the real estate office. He said that the obligation is on the salesperson who has a Certificate with the expiry date thereon which is to be carried at all times and shown upon request. The accurate completion of the application for registration or renewal and the necessity to be fully open and answer all questions in detail are stressed in the real estate course and would be known to Hall who completed five such applications in sequence.

Randall first heard directly from Hall by telephone calls in the first week of September 1990. His office has 9,500 registrants and phone calls come in every 40 seconds to his staff of seven. Randall had earlier been surprised by the report of the request from Warder as to who was employed in Re/Max Forest City Realty Ltd. He thought this was a good reason to do an inspection of both staff and the trust accounts. The inspection events as set out by Ms. Hetherington in her evidence were reviewed by Randall who noted that lapses of registration are not uncommon and that she had 175 active files. He mentioned the need for renewals at each opportunity when speaking to Real Estate meetings and had done so twice recently in London. Bulletins and newsletters are issued to repeat the message and to underline the registrant's responsibility to continue registration. A second copy of the pocket Certificate should be on file with the broker.

Randall said that Hall was harassing staff members with his dozens of calls and that the Director of Business Practices; the Assistant Deputy Minister and the Deputy Minister had all been called by Hall. The 10-day delay in receiving the application of August 30 resulted from Hall's broker not sending along the application promptly.

On September 12, Randall sent a memo to his superior, the Director of Business Practices noting that the application had been received and that the bankruptcy and criminal record matters had to be reviewed. A call went to Re/Max to ask for the supporting documents in the bankruptcy and a criminal record search was done through the Ontario Provincial Police.

In the following week, Randall decided to refuse registration and a letter was sent to Hall on September 19 telling him so, rather than having any possible delay of several months occur until a Notice of Proposal was completed and issued in the ordinary routine.

At the meeting with Hall on September 26, Ms. Hetherington and Mrs. Guggins were also present.

For Randall, the major concerns were the lapse of registration of 15 months (Issue 5), failure to disclose the criminal record (Issues 2, 4, 8, 11 and 17), the ongoing bankruptcy situation (Issue 7) and the extensive driving conviction record (Issue 9).

Randall noted from the meeting that there were no general consumer problems or shady dealings, that the bankruptcy was due to the costs of Hall's father's last illness and visits to settle the estate, and that a loss of licence would financially embarrass Hall and cause his family hardship and likely loss of their home. Further, there had been no criminal convictions for seven years. Hall told Randall that Chapman could not be present due to office business duties and that the broker should have ensured that Hall was in good standing. Hall was not aggressive at the meeting. The Real Estate Board hearing and the results (Issue 18) were discussed and this brought some concerns to Randall since these matters only rarely go the full route to completion through a hearing.

Randall sent a memo to Ms. Hetherington on September 27 to confirm his decision to refuse registration and an early Proposal was sought so that Hall could appeal to this Tribunal as soon as possible if he chose to. Randall was then involved with further calls and meetings with Greg Harkins (Issue 19) and with the Office of the Premier on October 3.

The Notice of Proposal was issued on October 19 giving speedy attention to Hall's file, said Randall.

Randall summarized his various concerns about Hall as being:

That Hall carried on trading for 15 months without registration and at the same broker's office. This was not a mix up owing to a transfer from one office to another (Issue 5).

That Hall had never fully disclosed his criminal record and that some vague notion of disclosure "to the Ministry" arising from the initial procedures of his life insurance registration is simply wrong (Issues 2, 4, 8, 11, 13, 17).

That the policy of the office was not to have an undischarged bankrupt registered (Issue 7). Financial responsibility is a

major item for registration and, like the completion of a term of parole after a criminal conviction, registration must await discharge from bankruptcy.

That the motor vehicle driving record was not disclosed and was so excessive as to show a current disregard for the rules of society (Issue 9).

That the criminal record was lengthy and serious (Issue 10) and included imprisonment. They were not 20-year old events of a juvenile who was now mature and had learned his lesson.

That the bankruptcy was caused by gambling and not by his father's illness and estate travel costs (Issue 12). This was a direct attempt to mislead and showed that potential pressures could seriously affect a "commission environment" job.

That no attempt was made by Hall to pay off the bankruptcy discharge term of \$2,000 (Issue 12), and that the knowing use of the income tax refund cheque showed a disregard for the law even understanding the desperate circumstances.

That other judgements were outstanding and Hall did not disclose them whether they should or would have been cleared by the bankruptcy at all (Issue 15).

That the events involving Carol Fuller (Issue 18) and Greg Harkins (Issue 19) showed Hall to be aggressive and excitable.

Randall also commented on the failure of Mrs. Boersma to be present at this hearing as the sponsoring broker who is assuming the responsibility for her employee, and who will know little or nothing of the many issues raised at the hearing. Randall admitted that the applications made in 1982, 1985 and 1987 were granted even if disclosure had not been complete, but did not accept that result as a bar to his review of them and of their contents.

On cross-examination, Randall stated that he could not accept the opinion that Hall did not know why he had been suspended and that his abrasive manner and flood of phone calls were in any way understandable.

In isolation, Randall stated that the lapse of registration could usually be cured. The issue of consumer protection does arise and a caution or reprimand can occur. If more than two years goes by, the necessity of repeating the course and paying the fees therefor are a real penalty. Also, the bankruptcy events can be cured upon discharge, said Randall, if there are no unusual circumstances or conditions attached.

Finally, with respect to the disclosure issues of the criminal and driving records and of the various events through the five applications, Randall saw this as a matter of serious concern although he admitted that in his term as Registrar, that single item was never used as the only reason for the denial of registration.

With respect to Hall's driving record, Randall agreed that traffic offence information was not required for the life insurance application answers of 1982, and that the further applications did have some listing of events since then although incomplete. While an honest mistake could be forgiven, Randall was of the opinion that the breaches of procedures and part-answers were not acceptable.

The items in the criminal record were acknowledged by Randall to be all before the 1985 application. However, Randall claims to see a thread of evasion and avoidance, of half-answers and strained explanations which is below standard. Randall also saw the alleged bankruptcy reasons as more than just a "white lie" or an embarrassment by Hall. The concerns of Carson as Trustee showed a failure of character by Hall to be correct and honest in his comments.

David Brinkman is a consumer services officer with the Ministry and assisted Jane Wilkins at the inspection of August 15, 1990. In his evidence, he stated that he had served Chapman and Warder and then Baldassaro with subpoenas to attend the scheduled February Tribunal hearing. In his view, Hall had not told Baldassaro of his situation and Baldassaro withdrew his sponsorship to avoid any problems for his small office and also to avoid having to attend a hearing in Toronto.

Dr. David Ballingal was called as a character witness on Hall's behalf. For eight years the family physician, Dr. Ballingal had used Hall in more than twelve property transactions. Hall's

criminal record was known and is just a matter of history to Dr. Ballingal and he accepts Hall as being generous and honest.

Jeffery Phillips is a London solicitor who has used Hall in three property matters and finds him competent and professional although somewhat excitable. Phillips has known of Hall's criminal record for some time. Phillips noted that without the lapse of registration, all the matters of criminal or driving record and the disclosures thereof, would never have come up and Hall would be continuing as a registered real estate salesperson.

In his evidence, Stan Hall addressed five areas of the Registrar's concerns. First, he commented on the 15 month lapse of registration about which he first became aware on August 15, 1990. He said that he knew of the two year term and that his earlier application renewal had been completed on March 22, 1987. He said that the earlier paperwork of renewal was done for him by the Canada Trust office and that he failed to look at the expiry date on his pocket Certificate. He said that he was mistaken in this, and had no intention to trade in real estate while unlicensed and no concern about any re-registering process.

Secondly, the question of disclosure was explained by Hall first with reference to the 1985 application. He stated that for him the granting of the probationary life insurance registration in 1982 cleared off any previous criminal record which had been "disclosed to the Ministry", so that the 1985 application for real estate registration had only the convictions of 1982 to mention (Issue 2). By attaching the note, he thought he had disclosed the event, even though the conviction was not in London, Ontario but was in New Westminster, B.C. and a jail term had been served there also. He maintained that any earlier convictions, while not referred to in the Life insurance application, had been eventually discovered and that a probationary registration was granted thereby effectively purging his past history. He agreed that he had lied on the 1982 application as he needed a job in order to buy a home as he was about to be married. The charge in Vancouver had been laid at the time, but no trial or conviction had occurred by then, so his answer was precise in saying "No". In 1985, he did not want his real estate broker employer to learn of the events in British Columbia so did not tell him, and entered the comment and details as explained (Issue 2). His comments concerning any previous registration were simply unclear and not meant to confuse (Issue 1).

Two days after the 1985 real estate licence was granted, Hall said that he had called "someone at the Ministry" to confess the details of the 1982 conviction, and felt accordingly absolved of having to make any further reference to it; since nothing

developed from his call. No letter was written, and his sponsoring broker was not informed.

By the time of the 1987 application, Hall believed that he need only refer to events in the previous two years and since there were several traffic offences, he simply added "ON RECORD" to his answer to Question 7 (Issue 4).

By the time of the 1990 application, his answer to the then Question 6 was "Speeding Ticket" (Issue 8) although he admitted that, in fact, the ten events on his record (Issue 9) were somewhat more than what he disclosed. He agreed that at the very least, he should have made the notation plural.

He did not mention the several outstanding judgements (Issue 15) in the application of February 26, 1991 as he thought these were all cleared off in the bankruptcy.

The area of Hall's bankruptcy was the third theme he addressed. The family home owned by Lily Hall now has a first and a second mortgage, and the execution filed for Household Realty Corporation (Issue 15) was in error as the mortgage securing the debt was discharged when the new second mortgage was arranged.

There were no real estate client matters involved in Hall's bankruptcy, and Hall agreed that the reasons and the events of the bankruptcy as set out by Tim Carson were correct (Issues 12 and 16). The events concerning the income tax rebate cheque were also confirmed.

Finally Hall referred to the lengthy criminal and driving conviction records which he had acquired. He denied any "thread of dishonesty" and asserted that his explanation should be satisfactory as each application and the discussion of events between each are considered.

Hall admitted to making some 125 telephone calls to Toronto in early September 1990. He was concerned with possible criminal charges, with the prospect of perhaps having to repay commissions earned over the 15 months and with the failure to mention to Gordon Randall the gambling issue in his bankruptcy.

Hall said that he did not tell Anna Boersma of this hearing, nor of his criminal record. He agreed that the Registrar was helpful in allowing the several sponsorship changes so that jurisdiction for this Tribunal would continue.

Hall presented to the Tribunal five recent letters from business contacts in London, and four 1987 letters of commendation

from Canada Trust officials; all as character references. He also brought to the Tribunal a letter of November 7, 1989 from the Hon. David Peterson, then Premier of Ontario, which referred to a repayment of a small courtesy loan that Hall was able to make and which sum Mr. Peterson then donated to the Cheshire Home in London where Mrs. Hall is employed.

While he has made errors, Hall seeks to be registered as a real estate salesperson because he knows the work and is successful at it. On cross-examination, Hall agreed that the topic of disclosure is stressed in the real estate course, that he thought one disclosure was enough and that he must disclose "to the Ministry office or to the Registrar's office". He agreed that the 1985 application had no reference to the 1982 conviction (Issues 2, 10 and 11).

Hall admitted to a number of "honest mistakes" and that he had lied on his life insurance application, that his Trustee in Bankruptcy was not initially told of the reasons for his problems, that the Carol Fuller event was wrong, that the Greg Harkins event really was not threatening, and that untruths about the criminal and driving records had occurred. He thinks his conduct should be excused because he is a good real estate agent; but agreed that the Registrar did have a "public duty" in these circumstances.

In summation, counsel for the Registrar reminded the Tribunal of the duty of the Registrar to act in the public interest and of the 1983 Brenner decision referred to in John Barroso (1990) 20 CRAT 422 at 428 where the Tribunal is directed by the Divisional Court to overrule the Registrar only if the Registrar is in error. Here the Registrar has reached a conclusion not to allow registration because of past conduct and current financial position and because a "thread of dishonesty" is seen with the occurrence of unacceptable conduct.

The evidence of the first nine witnesses was summarized and the various issues as they were referred to were recapitulated. The Registrar's various concerns as summarized earlier were reviewed to show in their cumulative effect the undesirability of having Hall as a registrant. A failure to fully disclose his criminal and driving history showed to counsel a disregard for authority and indeed some direct lies. She reviewed the items which were classed by her as twelve honest mistakes; five "white lies" and six continuations of lies; all of which have been highlighted in the evidence given concerning the nineteen issues of the Registrar.

In her opinion, the Registrar is correct in looking at the many issues and deciding unfavourably upon Hall's application.

Hall's conduct and threatening actions as well as his criminal and driving record are clear. His twelve honest mistakes are just too many and his unlawful conduct should not be excused. The absence of his current sponsoring broker and of Mr. Baldassaro as witnesses, who are in London and who both could have been favourable to Hall, was noted.

Counsel cited the decision John Barroso (1990) 20 CRAT 422 at 427 with respect to the absence of Hall's sponsor, where it is stated:

The Applicant's sponsoring broker was required to certify that the information given in this application was accurate to the best of her knowledge which she did, undoubtedly in good faith, without any inkling of all of this information withheld. In this last regard, the Tribunal attaches some significance to the fact that, after the initial sponsoring of the application before any of the withheld information had come out, no further support for the Applicant was provided to the Tribunal by the sponsoring broker. She did not appear here as a witness on his behalf and he did not have anything in writing from her, either by way of an affidavit or even a letter.

That decision also reviews the principals concerning proper correct answers, disclosure and the principals which guide a Registrar in deciding upon the public interest.

The importance of having a sponsoring broker present was also referred to in Glen G. Galbraith (1990) 20 CRAT 462.

The Tribunal was also referred to the decision of Israel Jakobs (1987) 16 CRAT 223 at 226:

A criminal record of itself, is not necessarily a bar to future registration. However, the offences for which Mr. Jakobs was convicted showed a very serious breach of trust. Quite aside from the financial loss suffered by the owners of the stolen diamonds, through his actions, Mr. Jakobs placed the reputation of his employer in jeopardy. Only the financial loss is being

rectified. An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act. "Integrity and honesty" are not merely words. They are standards that must be met. While the onus is on the Registrar to show that a person is disentitled under the Act to registration in the circumstances such as those before us, the Applicant must establish that his conduct and character will be unimpeachable and that there are no reasonable grounds for belief that he will not act in accordance with these standards.

.....

In addition, the Tribunal shares the Registrar's concerns about Mr. Jakobs' financial situation. It appears that some of the financial burden will be lifted from Mr. Jakobs in the future, but for the present it is still there. While he has shown that he can live on a very small budget, when circumstances were such that he needed money, he broke the law to get it. The Tribunal believes that a stronger financial base would be desirable for Mr. Jakobs before he enters an industry that has no certainty as to earnings.

Counsel noted that the issues of past conduct are also set out and discussed in the decisions of Orville David Bradt (1987) 16 CRAT 202 and Susanne L. King (1988) 17 CRAT 238.

In reply, counsel for Hall asked the Tribunal, when balancing the public interest, to also consider the effect of a negative decision on his client. While Hall remembered the many telephone calls and was somewhat unclear as to earlier details of his career, counsel suggested that such a pattern was understandable in that Hall had just been informed of his loss of registration as of August 15, 1990 and was very upset.

Hall's conduct thereafter did concern many persons, but much of the history is of petty matters and should not be given much weight in his view. The only incident in Hall's career which concerned ethics was the Carol Fuller hearing; and this was

balanced with the two character witnesses and the letters filed. While the lapse of registration is presumably Hall's fault, he noted that the broker has some responsibility also. This is a curable item and not a matter of integrity.

The use of the income tax rebate cheque was wrong, he said and while the Trustee in Bankruptcy was indignant about this, the desperate circumstances of the time have to be considered by the Tribunal. Hall's so-called "threats" against Harkness were just the over emphasis of an excited person who was in difficulties.

He stated that Hall's evidence before the Tribunal was presented in a calm and reasonable manner and that the Registrar should not go behind the 1985 application and registration as the events earlier were all considered or explained and only occurrences since then could be reviewable. He saw no relevance in the gambling issue and recalled his client's evidence that he has not gambled since the bankruptcy. The judgements referred to exist only because of the administrative steps needed to clear them off which have not taken place. He believes it to be an unfair onus on Hall to judge him on any pre-August 15, 1990 events. There is no duty on Hall to disclose charges in the 1982 application and the call to the Ministry after the 1985 application brought no response so Hall's status was confirmed as acceptable. Hall's new broker is just giving a helping hand to allow the jurisdiction of this Tribunal to remain, and no inference should be drawn from her absence as a witness.

While the cumulative effect of all of Hall's actions can cause great concern to the Tribunal, counsel suggested that each of the many items can be explained and that several matters which can be cured by registration should so be. In isolation, the bankruptcy upon discharge or a lapse of registration or a driving record are not reason enough to refuse registration.

While the criminal record may not have been precisely disclosed, there have been no further events since 1982. He noted that the question of full disclosure to a subsequent broker of events prior to an earlier registration is not clearly set out as a duty of a registrant. The only ethics question was that of Fuller and the criminal offences up to 1982 had no involvement with any real estate activities. Since 1985, there have only been certain driving offences which have not been precisely disclosed.

The Tribunal has considered all of the evidence presented by the Registrar and the responses given by Hall. Following the precedent of the Brenner decision and considering the facts of this

case and the other prior decisions referred to us, the Tribunal concludes that we cannot say that the Registrar has erred in his refusal to grant registration to Stanley Hall.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

JAKOBS REALTY INC. and
HARRY JAKOBS

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATIONS

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
J. BEVERLEY HOWSON, Member
MAURICE LAMOND, Member

APPEARANCES:
NEIL A. KAUFMAN, representing the Applicants

GAIL MIDANIK, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF
HEARING: 14, 15 August 1991 Toronto

REASONS FOR DECISION AND ORDER

Upon the commencement of this hearing, counsel filed the following Statement of Agreed Facts:

1. Harry Jakobs ("Jakobs") is registered under the Real Estate and Business Brokers Act ("the Act") as a broker, registration #1114054 and is the President, sole shareholder and controlling mind of Jakobs Realty Inc.;
2. Jakobs Realty Inc. is registered under the Act as a broker, registration #1115059;
3. Jakobs was first registered under the Act on June 27, 1968, as a salesman, becoming a sole proprietor on March 26, 1975, and the president/broker of his own corporation since June 10, 1975;
4. On July 27, 1988, and again on July 11, 1990, Jakobs signed renewal applications for Jakobs Realty Inc. which designated the Bank of Nova Scotia account no. 507-17 at 3169 Yonge Street as the corporation's trust account for the purposes of the Act;

5. Jakobs Realty Inc. has maintained three accounts, "Jakobs Realty Inc. - Trust", account no. 507-17, "Jakobs Realty Inc. Property Management Trust", account no. 508-14, and "Jakobs Realty Inc. - General", account no. 496-11, at the Bank of Nova Scotia branch at 3169 Yonge Street, Toronto, Ontario, in relation to its business as a real estate broker;
6. Jakobs, contrary to section 20 of the Act and the terms and conditions of Agreements of Purchase and Sale, has dealt with deposits given to his corporation in trust, until the completion of real estate transactions, without authorization and without requesting authorization, in the following cases,
 - a) in relation to transaction 87-225 (467 Drewry Avenue) Jakobs Realty Inc. received \$5,000 to be held as a deposit in trust pending completion of the transaction. Following a Mutual Release executed by the parties on November 7-9, 1990, Harry Jakobs issued a cheque on behalf of Jakobs Realty Inc. on November 14, 1990, to the vendors for \$6,595.29. That cheque was not honoured because of insufficient funds in the account. Despite promising the lawyers for the vendor that he would correct the matter by November 27, 1990, he took no action, resulting in a complaint to the Registrar on December 10, 1990 from the lawyers for the vendor;
 - b) In relation to transaction no. 90-566 (10 Penticton Court, Richmond Hill), on April 5, 1990, Jakobs Realty Inc. accepted a deposit of \$20,000 to be held in trust under the Agreement of Purchase and Sale until its completion on September 17, 1990. A deposit of \$20,000 was placed in trust account no. 507-17. On April 9, 1990, Jakobs transferred the \$20,000 by cheque from the trust account to the general account which was overdrawn by more than \$10,000 on that date. Between April 9 and 16, 1990, a series of cheques written by Jakobs reduced the balance in that account again to an overdrawn position;
 - c) In relation to transaction 90-570 (3523 Bathurst Street, North York), Jakobs Realty Inc. accepted \$35,000 as a deposit to be held in trust pending completion of the transaction on November 30, 1990, in accordance with the terms and conditions of the Agreement of Purchase and Sale executed on

October 20 - 23, 1990. On December 17, 1990, Jakobs issued a cheque to the selling broker in the amount of \$14,140.00 for commission. On December 18, 1990, that cheque was not honoured because of insufficient funds in the account;

- d) In relation to transaction no. 90-572 (125 Vaughan Road, York), Jakobs Realty Inc. received a deposit in the amount of \$50,000 to be held in trust pending the completion of the transaction of September 21, 1990. This deposit was placed in account no. 508-14 instead of account no. 507-17 as required under section 20 of the Act. At the time of the deposit, the account into which it was deposited was overdrawn by \$23.17. On the same day as the deposit, five cheques were issued by Harry Jakobs reducing the account balance to \$29.20. On July 9-10, 1990, a Mutual Release was signed by the parties, instructing Jakobs Realty Inc. to return the deposit in full to the Purchaser. On July 13, 1990, Jakobs issued a cheque to the purchaser for the total amount of a deposit, \$50,000 from trust account no. 507-17. On that same day, the cheque was refused because of insufficient funds in the account. The last transaction in that account before Jakobs issued the \$50,000 N.S.F. cheque occurred on July 6, 1990, when Jakobs issued a cheque reducing the balance in the account to zero;
- e) In relation to trade no. 90-573 (150 Neptune Drive, North York), on July 20, 1990, Jakobs placed the deposit of \$5,000 into account no. 507-17 in accordance with the Agreement of Purchase and Sale of that date to close on September 8, 1990. Also on July 20, 1990, Jakobs issued a cheque in the whole amount of the deposit, \$5,000, transferring that amount from the trust account to general account no. 496-11. At the time of the deposit into account no. 496-11, that account was in an overdrawn position. On the same date as the deposit, two cheques issued by Jakobs reduced the balance in the account to \$46.76;
- f) In relation to transaction no. 90-574 (158 Queen Street East, Brampton), on July 27, 1990, Jakobs placed a deposit of \$30,000 in account no. 508-14 instead of the trust account no. 507-17 where it was to be held in trust under the Act pending the closing of the transaction on October 15, 1990.

At the time of the deposit, the account into which it was deposited was overdrawn by more than \$4,900. On that same day, Jakobs issued a cheque marked "ADJ. to ACCT." for \$13,000 on account no. 507-17 and deposited that cheque into general account no. 496-11. At the time of the deposit, account no. 496-11 was in an overdrawn position by more than \$600.00. By a series of cheques issued by Jakobs, the new balance was reduced to \$1,488.89 on that same date. Those cheques included one for \$912.69 to Harry Jakobs marked "Remimb. petty cash", another to pay off charges against two of Jakobs' personal credit cards totalling \$2,500, and one in the amount of \$4,500 to pay a contractor on Jakobs' home. Also on July 27, 1990, Jakobs issued a cheque in the amount of \$10,472.08 from account no. 508-14, transferring that amount to trust account no. 507-17. At the time of the transfer, account no. 507-17 was in a zero balance position, Jakobs having issued a cheque on July 25, 1990 which eliminated the balance at that time. Between July 27 and 30, 1990, cheques issued by Jakobs reduced the amount of money in the trust account to a balance of \$1,166.95. These cheques included cheques issued to parties under other transactions which had already closed. These cheques represented interest on the deposits in previous transactions which did not involve the same vendors or purchasers. As well, those cheques included commission cheques and a referral fee issued in relation to other transactions which was already closed. On July 30, 1990, a Mutual Release was signed between the parties to a transaction involving 158 Queen Street East. On July 31, 1990, Jakobs by way of a \$6,000 cheque, from account no. 508-14 (the account into which the \$30,000 deposit had been placed) transferred that amount to general account no. 496-11. At the time of the transfer and deposit, account no. 496-11 was in an overdrawn position by more than \$4,800. On July 31, 1990, a balance of that account was again reduced into an overdrawn position when a cheque issued by Jakobs on that account eliminated the balance. On August 9, 1990, Jakobs issued a cheque for \$30,000 on account no. 507-17 to refund the deposit in this transaction. At the time of issuing the cheque, account no. 507-17 had insufficient funds to cover the cheque and it was dishonoured on August 10, 1990 when it was

presented to be processed;

- g) In relation to transaction no. 90-576 (126 Haslam Street, Scarborough), on August 15, 1990, Jakobs placed \$10,000 which was to be held as a deposit in trust pending the closing date of September 28, 1990, in trust account no. 507-17. Also on August 15, 1990, the balance in the trust account was reduced by cheques issued by Jakobs totalling \$9,999.70, leaving an outstanding balance of \$1,135.25. On October 15, 1990, Jakobs issued a cheque for the balance of the deposit to the vendors in the amount of \$5,800. On October 18, 1990, the cheque was dishonoured because of insufficient funds in the account;
7. Jakobs Realty Inc. is currently indebted to Revenue Canada in the amount of \$94,932.87 for unpaid taxes, this account being the subject of a federal court judgement in 1990;
8. During the period, March 30 to August 15, 1990, Jakobs issued cheques on accounts held by the Bank of Nova Scotia in the name of Jakobs Realty Inc. causing,
 - a) Real estate trust account no. 507-17 to be overdrawn 11 times with 11 cheques being dishonoured;
 - b) Property trust account no. 508-14 to be overdrawn 12 times and 11 cheques to be dishonoured;
 - c) General account no. 496-11 to be overdrawn 53 times and 41 cheques to be dishonoured;
9. On August 14, 1990, pursuant to an inspection indicating that there were deficiencies in the real estate trust account of Jakobs Realty Inc., a Freeze Order was issued by the Director of the Consumer Protection Division against the accounts held by Jakobs Realty Inc. at the Bank of Nova Scotia at 3169 Yonge Street;
10. On August 20, 1990, that Freeze Order was served on Harry Jakobs personally;
11. On October 9, 1990, Harry Jakobs opened a new account at the Royal Trust in the name of Jakobs Realty Inc. and used that account for the purposes of dealing with the handling of money which was supposed to be held in

- trust under real estate transactions for which Jakobs Realty Inc. was a broker;
12. On December 7, 1990, pursuant to information received by the Ministry that Jakobs was issuing N.S.F. cheques on the Royal Trust account for the purpose of distributing trust money, the Director issued a Freeze Order against the accounts held by Jakobs Realty Inc. at the Royal Trust at 3312 Yonge Street;
 13. On December 7, 1990, that Freeze Order was served on Harry Jakobs personally;
 14. On January 22, 1991, Harry Jakobs was charged by the Police with six counts of fraud in relation to his operations as a real estate broker;
 15. On June 17, 1991, Harry Jakobs pleaded not guilty to the charges of fraud, but guilty to one count of having misappropriated money held under direction in relation to the \$30,000 deposit which he received regarding the transaction involving 158 Queen Street East;
 16. Harry Jakobs was convicted under the Criminal Code of having misappropriated that money and was placed under a Probation Order which included a term that he is "not to have any trust account in his name or to be in charge of any trust in any company", the term of probation being for two years. The remaining charges were withdrawn by the Crown;
 17. The Ministry is not aware of any prior consumer complaints relating to Jakobs;
 18. Of the seven transactions listed in paragraph 6 of this Statement of Agreed Facts in which Jakobs dealt with deposits contrary to section 20 of the Act the transactions described in paragraph 6(a) and 6(c) have not been rectified. In the remaining five transactions, the consumer losses were satisfied by Jakobs.

Counsel for the Registrar also filed with the Tribunal a Notice of Proposal to Revoke Registration for both Harry Jakobs and for Jakobs Realty Inc. as real estate brokers. That Proposal was issued on September 7, 1990. Also, the Tribunal received a Notice of Further or Other Particulars for both registrants which is dated February 28, 1991. In support of the allegations in the Statement of Agreed Facts, the Tribunal also received a volume with sixty reference documents which supported the details of the

Statement of Agreed Facts.

Counsel for the Registrar read through the Statement of Agreed Facts and referred the Tribunal to the various confirming documents for each paragraph as they appeared in the volume cited previously.

Marion Hetherington is a Registration Officer with the Business Practices Division of the Ministry of Consumer and Commercial Relations, and has conducted investigations since May, 1988. She first received a complaint in the transaction for 158 Queen Street East in Brampton which is Item 6(f) in the Statement of Agreed Facts. She became involved with and is knowledgeable about all of the other issues in the Statement. To her knowledge, the consumer complaints for items 6(a) and 6(c) remain unresolved, and there is another matter of a deposit received and real estate commission claimed against that deposit which has not been resolved. She confirmed the current registration particulars of both registrants as set out in paragraphs 1, 2 and 3 of the Statement of Agreed Facts.

Miss Hetherington also expressed an added consumer concern in that the telephone listing for Jakobs Realty Inc. is not in service and there is no publicly available listing for Harry Jakobs. On cross-examination, she agreed that the situation in 6(f) was rectified before the investigation by her office had even begun. The situation of notice by the registrants for further trust accounts and the possible granting of permission for them by the Registrar was reviewed. The Tribunal finds that the Registrar's current files did not show complete details either way so that the concerns about the disclosure of other trust accounts as set out in paragraph 5 of the Statement became a moot issue, particularly when inspection reports did have references to their existence. We agree that the current application form should clearly set out the requirement for the listing of all trust accounts for a brokerage under question 8 thereof, if the Registrar considers that to be an item of important current disclosure.

Gordon Randall ("Randall") has been the Registrar of Real Estate and Business Brokers since July 18, 1988, and is familiar with this file. He reviewed the contents of the Proposal, the Notice and the Statement.

Section 6 of the Real Estate and Business Brokers Act is as follows:

6.-(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or
- (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

(2) A registration is subject to such terms and conditions to give effect to the purpose of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

The Registrar explained to the Tribunal how, in his opinion, Harry Jakobs contravened Section 6(1)(a) and 6(1)(b) and 6(1)(d); while Jakobs Realty Inc. contravened Section 6(1)(c)(i) and 6(1)(c)(ii).

The matter of the telephone numbers was a concern to him. First, a consumer could not readily contact either registrant by telephone. Secondly, there would be a possible delay in his office contacting the registrants to arrange an inspection or for other reasons. On cross-examination later Randall acknowledged that Harry Jakobs' home telephone number was listed on the renewal application of 1990. Harry Jakobs has been a registrant and a salesman and broker for 23 years, and Randall saw this telephone issue and the matter of the further trust accounts not otherwise listed on the application as matters of some concern. He agreed that the actual usage to which a further account was put as set out in paragraph 6(d) of the Statement was the most important problem in the trust account themes.

In Randall's view, the abuses of the trust account responsibility, as set out in the parts of paragraph 6 of the Statement, were breaches of duty and responsibility which were unacceptable and which could not be condoned or explained. The fact that cheques issued on a trust account were returned "N.S.F." was unforgivable to Randall. He stated that some 240 real estate firms closed in 1990, but only 12 of those closures had trust fund difficulties and only four of the 12 had consumer monies at risk because of unauthorized transfers from the trust fund by brokers.

The issue of the Revenue Canada judgement against Jakobs Realty Inc. causes Randall concerns as to the financial stability and responsibility of both that brokerage and of Harry Jakobs since Harry Jakobs is the sole director and shareholder of Jakobs Realty Inc.

The sequence of the freeze orders, as set out in paragraphs 9, 10, 11, 12 and 13 of the Statement was reviewed by Randall. He had been astounded by the opening of a second trust account by a broker under the freeze order. This had never happened before to his knowledge, although he admitted on cross-examination that there was no rule against such an event.

The second account was only discovered when a cheque issued on it was returned "N.S.F.", and a complaint was made. Randall noted that business can be carried on in a frozen account situation with releases and transfers of funds arranged with permission by the Registrar although this is somewhat inconvenient for the broker.

The criminal conviction as set out in paragraphs 14 and 15 of the Statement was also a concern to Randall. He had not been involved in any plea bargaining and was unconcerned with the withdrawal of five of the charges. The two-year probation term has just begun and in Randall's view and past policy, registration is not allowed in the public interest until such a term is completed. For Randall, the actions of the 23-year experienced registrant in these circumstances leave him no alternative. If a business had failed, a broker might have salesman status granted where the person was not continuing as an officer of a registrant. Here there are consumer funds taken and in two cases and perhaps a third, these funds are lost and remain unreplaceable.

Randall acknowledged that this hearing had been adjourned from a February, 1991 date on detailed terms and conditions in order that a new counsel for the registrants could prepare. While these terms and conditions have kept the registrants under very tight control, Randall does not see their continuance as a possible basis for allowing the two registrants to remain in business.

On cross-examination, Randall agreed that all of the events in paragraph six of the Statement occurred in mid-1990, and that there were no records of any consumer complaints or Registrar's concerns about Harry Jakobs in the prior 22 years. Counsel for the registrants presented two character witnesses on behalf of Harry Jakobs ("Jakobs").

John I. Zeiler is a Toronto lawyer in corporate and commercial practice for 20 years. He is an instructor for the Real Estate Institute, and has known and acted on behalf of Jakobs for some seven years. In his view, Jakobs is always well prepared in his business files and has had good conduct in his career other than for the events of 1990. Having had serious personal and family concerns himself, he understood how Jakobs could not be at his best and thinking clearly at a time of stress. While he could offer no excuse for Jakob's conduct, he saw a possibility of Jakobs remaining as a real estate salesman without any access to trust funds.

Henry Russell Tandler was an inspector with the Registrar's office from 1955 to 1987. He knew Jakobs in passing and offered to be of help when they met on the street and Jakobs explained his problems. He recollects no difficulties over the years and that Jakobs was very fussy to have all details in a file correct. He knew of no unethical or unprofessional conduct, any disqualifications or any shortcuts in Jakob's practice. He admitted being very surprised by today's evidence and found it completely out of character. He volunteered to come before the Tribunal on Jakob's behalf and has never testified on behalf of any other registrants. He acknowledged after hearing the evidence brought before the Tribunal that the issues herein are most serious.

An additional letter was presented to the Tribunal from Rabbi Joseph Kelman, who has known Harry Jakobs very favourably for over 30 years. The Rabbi knows Jakobs' parents and those of his wife, together with his children and speaks highly of their family solidarity and their commitment to their synagogue and the community.

Harry Jakobs reviewed his career as a registered salesman since 1968 and a broker since 1975. He had up to 55 agents employed during the 1980's with a busy commercial and investment practice. He is 44, and the sole earner for his family which includes his wife and three teenagers.

In his recollection, the various additional trust accounts referred to by the Registrar had all been opened with permission, and full records were always available in any event at

the time of any routine inspection and were always in perfect order.

His office has ceased operations for some weeks and all staff have moved on. The business records are at his office and readily available. He explained the opening of a new trust account after the first freeze order as a necessity to carry on business, and stated that three lawyers had given him opinions as to his right to do so. The matters in paragraph 6 of the Statement are all agreed to and he acknowledges that they are serious. Jakobs had great business success in 1988 and 1989; and began construction of a new house. While his own home was by then without a mortgage, he was caught in bridge financing and construction payment problems as his own home did not sell in the recession and his income fell drastically due to fewer transactions and some of them not closing.

In early 1990, he ran out of money and could not borrow any more from any source. He spoke of receiving daily threats from creditors who demanded payment and suggested physical harm to him and his family if monies were not immediately paid. A mortgage was arranged for his own office building, but delays required him to take monies from trust which he expected to promptly repay. He had meanwhile disposed of his R.R.S.P. assets, used his children's savings and sold jewellery in order to make payments to his creditors. He expects to sell his new home this year and pay off all of his outstanding obligations. He has no justification for what he did but sees his actions as an aberration due to excessive pressures in a five-month term. The criminal conviction has left him under psychiatric care and his family members are all receiving counselling as well.

Jakobs would seek to remain as a broker under the present terms and conditions of the earlier adjournment with an additional requirement to repay the outstanding monies he owes. In the alternative, he would be prepared to be a broker or a salesman under the supervision of another broker and have no access to any trust funds. He is anxious to retain his registration in the only business he knows and believes that his parole will keep him out of any future problems without question.

In cross-examination, Jakobs stated that he had no outstanding listings or pending sales at his office and that all terms and conditions of the adjournment had been met. He repeated that the issue of trust is most important for a broker's operations and that he had never intended to steal any funds.

In addition to the outstanding consumer items of 6(a) and 6(c) in the Statement, Jakobs also admitted that a \$15,000 deposit in another matter was taken by him from trust. Jakobs claims a countervailing commission debt owed to him from the transaction but

agrees that a mutual release from the parties did instruct him to pay out the monies in trust; which, in fact, are not in his trust account today.

In concluding argument, counsel to the Registrar reviewed the Notice of Proposal and the Notice of Other and Further Particulars and stated that the Registrar has not erred in using his discretion to seek to revoke the registration of both brokers. In her view all of the statutory tests of Section 6 have been met and both licences should be forfeited.

For Harry Jakobs, the N.S.F. trust cheques; overdrawn accounts; criminal conviction; current parole term and the burden of the judgement against Jakobs Realty Inc. all made him unsuitable to continue.

For Jakobs Realty Inc., that judgement threatens the financial position of that broker and the corporate activities as explained fall clearly into both subparts of Section 6(1)(c) of the Act. The Tribunal was referred to the decision of Alfred Joseph Hutter and Re/Max Classic Realty Inc. (1990) 20 CRAT 481. She cited the similarities with the present situation where a broker with long experience and his own corporation was found to have accounts overdrawn and early transfers made as well as consumer deposits used and a co-broker commission not paid. There the broker also sought continuation as a salesman since this business was his whole career. She noted that in addition in the present situation, there is a substantial judgement going to Revenue Canada, a criminal conviction, a two-year parole term just begun and debts to various other creditors.

In her view, since all the questionable financial actions were knowingly done by Hutter as the sole officer, director and shareholder of Re/Max Classic Realty Inc. and the Registrar there was directed to carry out his proposal, this Tribunal could not do otherwise than support the Registrar and also direct that he carry out his proposal.

The decision of Alexander Bodon (1984) 13 CRAT 247 is referred to in the Hutter decision, and counsel drew the attention of the Tribunal to the excerpt from p.257 of that decision which appears at p.485 in the Hutter decision. In addition, counsel reviewed with the Tribunal the divisional court decision with respect to Richard G. Brenner (1990) 19 CRAT 58. This 1983 decision sets out clearly the procedure which this Tribunal is to follow in appeals such as the one before us. The Tribunal is instructed that it "should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant

afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty".

Counsel for the registrants encouraged the Tribunal to substitute its opinion for that of the Registrar where there are not reasonable grounds to believe that future actions will necessarily put the public at any risk. He noted that there was remorse shown here as well as admission of wrong doing, unlike the situation in the Hutter decision. The good 22 years of a career should be balanced against the errors of five months in his view, and he sought the continuation of registration of Harry Jakobs as a broker under the continuing terms and conditions of the adjournment together with any terms as to repayment of outstanding obligations or any other terms and conditions which the Tribunal might wish to impose. While the errors of Jakobs in 1990 are serious, he saw this as an aberration in a career otherwise without blemish. This was a desperate temporary grab made by a man under great personal pressures; and was not a scheme to steal consumer funds. The publicity of the events has already been a severe punishment for Harry Jakobs and for his family, his counsel said.

The Tribunal has given serious consideration to the facts in this appeal and recognizes that Jakobs has had a lengthy career in real estate without any apparent problems until 1990. However, the circumstances here are even more serious than those outlined in the decision of Alfred Joseph Hutter and Re/Max Classic Realty Inc. In that decision, the Tribunal found at p.486 that the Registrar "has made out by the evidence that he has reached conclusions sufficient to fulfil the onus on him under Section 6 of the Real Estate and Business Brokers Act ...". In that decision, the Tribunal could not say that the Registrar had erred and that his conclusions were unreasonable and in the appeal before us here, we cannot do otherwise than to support the Registrar.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

PAUL STEPHEN KASH

APEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
TIBOR PHILIP GREGOR, Member
A. DONALD MANCHESTER, Member

APPEARANCES:

ANTHONY HERSCHE, agent

JANE WEARY, representing the Registrar
under the Real Estate and Business Brokers Act

DATE OF
HEARING: 21 December 1990

Toronto

REASONS FOR DECISION AND ORDER

On April 17, 1990, Paul S. Kash applied to be registered as a real estate salesperson. Born on April 23, 1952, he is now 38 years of age.

On September 18, 1990, the Registrar issued a Notice of Proposal to refuse registration pursuant to Section 6(1)(a) of the Statute:

- (a) having regard to his financial position,
the applicant cannot reasonably be expected
to be financially responsible in the
conduct of his business.

The particulars upon which this refusal was based are:

- I. that Kash made an Assignment in Bankruptcy on March 24, 1981 from which he received an Absolute Order of Discharge on December 14, 1981.
- II. that Kash has various outstanding judgements against him which he stated were to the amount of approximately \$40,000.

- III. that in discussions with Kash, the 1981 bankruptcy was admitted to be the result of over ambitious real estate based investments which saw a loss of Kash's \$200,000 capital; the legacy left him by his deceased parents.
- IV. that Kash's present wages as a clothing salesmen are garnished to 20% and further, and \$125 is paid monthly under a Small Claims Court Consolidation Order to other creditors.

Randy Persaud has been a reviewing officer in the Registrar's office for the past eighteen months and was given the Kash application to investigate because of the bankruptcy and judgement admissions. In discussing the details with Kash, Persaud explained the Registrar's policy in such situations to be that any outstanding judgements must be paid off or a repayment schedule must be in place before registration could occur.

A list was sent in by Kash on May 16, 1990 showing a total of \$85,319.66, including \$20,636.16 in five District Court executions upon which Kash is paying \$177.30 monthly from the garnishee. That amount can not cover the interest accumulating on the total.

A list of other creditors was submitted by Kash to the Tribunal showing a total of \$27,577.52, and he proposed to pay each of the eight parties the sum of \$5 monthly to show his good faith; but payments thereon have not been made in the past six months.

Persaud agreed that only the facts of the various judgements and debts were gathered by him, and that no review of the reasons for the debts was made. Persaud stated that whether or not the judgements were paid or a repayment schedule was being followed, the final decision as to registration would be that of the Registrar.

Neal H. Roth is a solicitor in London who reviewed recent third mortgage transactions on four properties owned by Kash. Included on the list of debts submitted by Kash was the amount of \$58,884.13 being a judgement obtained following the necessary pay out of a second mortgage on one of the properties by the third mortgagee to protect the various third mortgages; all of which were in default.

In addition, Roth has begun a legal action with a 65-page Statement of Claim where fraudulent misrepresentations and appraisals are alleged. Roth appears to act for various lenders of last resort where high interest rates and bonuses are part of the practice; however the allegations made as to various events are serious and can be considered by the Tribunal as to the credibility and business practice of the Applicant Kash.

Gordon Randall, the Registrar, in his evidence agreed that he is concerned only with the financial position of Kash. He noted the heavy debts and the great pressure to satisfy creditors which would burden Kash. Both the garnishee and the Consolidation Order saw, in his view, little prospect of ever being satisfied. As a commission salesman for a clothier, Kash would have difficulty in keeping current any plan for repayment while real estate sales and projects for a part-time person in a recessionary market would be rare. The Registrar believes that any view that such debts could be paid off in eighteen months under the present economic situation show how unrealistic Kash continues to be in his financial plans. He is also of the view that the present problems are of the same style which led to the bankruptcy of 1981 with aspects of "wheeling and dealing".

The Registrar reminded the Tribunal that the real estate industry is a regulated one where protection of the consumer is of paramount concern. In his view of Kash, the Registrar does not presume any dishonesty. He is, however, concerned with a pattern of overspending; over ambition; a lack of commitment or ability to repay debts, the large dollar amount owing in judgements and to other creditors; and the failure to make the voluntary \$5 per month payments to the eight remaining major debtors.

The Registrar stated his opinion that in all cases, the scale must be tipped in favour of the consumer. This is an extreme proposal where financial ability is openly questioned. Even an attempt at bonding or the overview of a broker would not be suitable here. This is not the case of a car salesman on site, under supervision and with no direct financial involvements in a transaction. The activities of a real estate salesman are mainly away from the office and the representations made cannot be easily supervised.

Paul S. Kash resides at 500 Jeffreybrook, in London with his wife who is a Canada Trust real estate agent for the past two years and their three children. He is employed at Harry Rosen Inc. in London at a weekly salary of \$200 plus commission. Her net income was \$30,000 last year. Mr. Kash has no criminal record.

He explained the judgement of \$58,884.13 as a matter to which he had a good defence, but where his solicitor at the time failed to defend. A motion is to be brought to attempt to set that judgement aside and obtain at least a full trial on the issues and merits. He also referred to complaints made to the Law Society of Upper Canada as to the bonuses and charges made by a firm of solicitors who were acting as bankers for his renovation mortgage projects.

A total of Kash's debts by judgement and otherwise was said by him to be currently about \$118,000 plus interest. Kash says that he has been honest and has fully disclosed his situation. He does not want to go bankrupt again. The earlier bankruptcy had losses of more than \$1,000,000. He is at present a guarantor on various mortgages on his two remaining properties in the amount of \$500,000. To qualify as a real estate salesperson, he repeated the first and third parts of the course, while he was working during the day.

Kash stated that he is well connected in London and offered various letters of recommendation, including several from parties to whom he owes money. He believes that he has a knack for finding and developing commercial opportunities and would succeed by advising others.

Ron Rossini is Kash's sponsoring broker and is prepared to take him on as one of his 20 salespersons in a part-time relationship. Rossini expects that Kash would soon become a successful full-time employee. Kash has told Rossini of all his financial obligations and no monies would be handled directly by Kash. Strict terms and conditions would be acceptable to Rossini with active supervision and a full review of all transactions, including interviews of parties. An income of \$20 to \$25,000 could be expected for Kash if he worked even on a part-time basis.

In argument, counsel for the Registrar stressed the obligation on the Registrar to decide on registration of a person from the view of consumer protection in a regulated industry. On the facts of Kash's record, his previous major bankruptcy, his present disastrous financial situation and his inability to pay off or even to service his debts all make him unsuitable for registration; notwithstanding his sincerity and his plans to deal with all the various claims against him.

In support of the Registrar's view, counsel referred the Tribunal to the decision of Alexander Bodon (1984) 13 CRAT 247 where "financial responsibility" was described from page 255; and the Tribunal found at page 256 that:

In the case of a registered real estate salesperson, therefore, "his business" would be the activities in which he or she was engaged, *inter alia* would mean the activities which he was performing or in which she or he was engaged during the course of that salesperson's employment. In short the word has full and complete application to both real estate brokers as well as to real estate salespersons. The Tribunal hopes that the above expression of its view and opinion will set this particular question to rest both in respect to this Act and other similar statutes.

The Tribunal continued at page 257:

But it seems to the Tribunal, that its function and that of the Registrar in the first instance, is not to punish. It is to protect. There are different species of misconduct which different individuals appear to possess propensities to commit thus setting other members of the public at risk. It is frequently necessary to put the interest of totally and absolutely innocent potential victims at an even higher level of consideration than those of an applicant for registration, who, in the criminal sense, has already been punished. This is not easy, especially when the individual the Tribunal sees before it is a palpable person while the ones protected from harm are anonymous members of the vast public at large whom one does not see as specific individuals. It is not easy and it should not be easy. We believe that no effort should be spared in any instance to examine and re-examine every possible way in which fair play and decent consideration can be assured to all the interest in any given problem situation with which the Registrar or later the Tribunal may be faced.

The Tribunal adopts the reasoning of the Alex Bodon decision and accepts the decision of the Registrar based, as it is, solely on the principles outlined in Section 6(1)(a). This may

indeed be the first time that the Registrar has used this subsection alone and not in tandem with the more ordinary claim of past conduct leading to questions of integrity or honesty.

While counsel for the Applicant Kash noted that a prior bankruptcy is not necessarily a major factor (Gary M. Gordon 1989 CRAT 289 at 290), we note that the bankruptcy of Kash involved more than a \$1,000,000. In his view, counsel believes that the Registrar's opinion of severe financial pressures being able to influence Kash in any real estate transaction is a most extreme view. The Tribunal agrees that the view suggested is extreme, but we are unable to say that the Registrar is wrong in holding such an opinion.

The principles for our guidance are repeated in the Gordon decision at pages 292 and 293. Following the guidance of the Richard G. Brenner decision (1989 19 CRAT 58), we support the decision of the Registrar.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant's registration.

GERALD KING

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPt, Q.C., Chairman, presiding
SELWYN CHARLES, Member
A.D. MANCHESTER, Member

APPEARANCES:

PAUL D. AMEY, representing the Applicant

JANE WEARY, representing the Registrar under the
Real Estate and Business Brokers Act

DATES OF

HEARING: 11, 17 December 1991

Toronto

REASONS FOR DECISION AND ORDER

On October 19, 1990, the Registrar of Real Estate and Business Brokers issued a Notice of Proposal to refuse to renew the registration of Gerald King ("King") as a real estate salesperson pursuant to the power in section 6(1)(b) of the Real Estate and Business Brokers Act that:

- 6(1)(b) the past conduct of the Registrant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

The reasons for the proposed termination of King were:

1. that a comment on a Notice of Employee Change by a terminating employer stated:

Mr. King has a very volatile temper which seemed to cause various major arguments in the office, often unfounded. He negates office policy on a regular basis, and was recently charged with unethical conduct by the Brantford Real Estate Association. Further to this at point of hiring I was unaware of the fact that he had been charged and convicted of assaulting in Criminal Court, and is currently awaiting

trial on another assault charge. He is however extremely dedicated to his clients, and I have received testimonials to this effect.

2. that on his application for renewal of March 20, 1990, King disclosed two convictions for events in 1988 and 1989, but did not on that application or on a further one of July 20, 1990 disclose a conviction in 1988 on a charge of aggravated assault where he had struck his wife one blow while he was drunk.

Randy Persaud is a registration officer with the Registrar's office and he gave evidence as to the background documents presented to the Tribunal. He noted that King's first application for registration was dated March 19, 1987 wherein he disclosed a conviction for common assault which followed an event on a picket line at the Brantford City Hall in 1984. King had completed his real estate courses on February 28, 1987 and was granted registration as a salesperson.

When the application of March 15, 1990 was received, Persaud did a review of the attached Certificates of Conviction which set forth the August 14, 1988 Mischief conviction for the trashing of a car after a party at a campground for which a 30-day intermittent sentence was given, together with an order to repay damages and a term of 3 years probation. The second conviction was on October 28, 1989 for an assault for which a fine of \$500 was levied, together with a two year term of probation.

Persaud called King's former broker employers and looked at the Notices of Change on file which led to the first issue for the Registrar as set out above. Five Notices of Change were presented to the Tribunal, of which three had no comments. The one of Daniel Swanson of Westshire Real Estate made on January 10, 1990 is set out above and the other made by Louis Karmiris on March 4, 1988 states:

Misbehaved, very temperment (sic), abrupt and uses foul language.

Persaud agreed on cross-examination, that King would not have seen these forms or their comments and would be unaware of their content. Persaud also agreed that the first application of March 19, 1987 did disclose the picket line conviction although that was not so written in the actual Notice of Proposal where both that and the assault on Mrs. King were said to not have been disclosed. King's application for renewal of February 20, 1989 had an answer "No" to the question 6 about convictions or charges pending when the 1988 conviction for mischief should have been

disclosed as it was later on the application of March 20, 1990.

Persaud said that he then ordered a record of King's convictions for the assault on December 26, 1987 on his wife, Barbara King to which King pleaded guilty and was sentenced to 10 days in jail with probation for 18 months. This conviction was the one not disclosed in King's applications in 1990 which forms the second reason of the Registrar to refuse renewal of registration to King.

In expanding upon the charge of unethical conduct to which Daniel Swanson had referred, Persaud presented a letter from the Brantford Regional Real Estate Association which stated in part:

Charge was: "That on October 21, 1989, Gerry King did violate Regulation No. 4, Section 5(b) made under the Association's bylaws by communicating directly with the vendor of real property without the listing broker's authorization while a listing with a competing listing broker was in force."

Disposition:- That Gerry King be required to pay a fine of \$300.00

- That Gerry King also be required to pay 75% of the Secretary's legal expenses or \$2,000.00 whichever is less **
- That the results of the hearing be published without names on a separate insert to all members
- That a letter be written by the Board to the selling broker/firm stressing the importance of a broker's monitoring and maintaining a satisfactory degree of control over its salespeople.

Persaud also presented by letter from a probation officer in Brantford information that King is on parole for the automobile mischief conviction until April 3, 1993, and on the 1989 assault conviction until February 26, 1992.

Daniel Swanson ("Swanson") has been registered in real estate for eight years and is a broker for the past three and one-

half years. He owns 51% of Westshire Real Estate Inc. which is dormant at present while Swanson is an associate broker elsewhere. He was King's employer from May 30, 1989 to January 10, 1990 and wrote the comments on the Notice of Change referred to earlier. In support of his allegations about "various major arguments in the office", he spoke of a Monday morning staff meeting when King harangued another salesperson, Ms. Morningstar, about stealing or attempting to steal some of King's clients. The ethics issue was recalled as Swanson was a Director of the Association at the time and was present and a witness at the hearing. While King had said otherwise, Swanson gave evidence that he had not been involved in the event and the Ethics Committee accepted Swanson's evidence. After King was terminated by Swanson, King went to work for his present sponsoring broker, Conrad Eggel for whom Swanson had earlier been office manager.

On cross-examination, Swanson admitted that there was a disagreement over some balance of commission dollars owing to King, and that the Employment Standards Branch of the Ontario Ministry of Labour was involved in sorting out the situation. Swanson would not comment on his leaving Eggel's employ with a secretary and a number of salespersons to open his own office and as to whether that left a happy continuing relationship between him and Eggel. Swanson denied having any criminal or driving convictions or pending charges outstanding and stated that there was no agreement to relieve King from the usual telephone desk duty which is expected of salespersons for several periods each week. He agreed that there were no complaints against King by any clients or from the public while King was employed at Westshire.

Michael Hurley is a broker who was King's first sponsoring employer for just one week from March 31 to April 6, 1987. Hurley stated that by the time the licence arrived, King had moved on to Canada Trust. He said that a discussion with King turned into an argument and he decided that King should go elsewhere. Hurley was on the Association Board of Directors for the ethics event and he agreed with the Board's decision. He denied being influenced in any regard by the fact that Swanson was also a Director at that time. The Board reviewed the findings of the Ethics Committee and both King and Swanson gave evidence at that meeting, he said.

Gordon Randall is the Registrar of Real Estate and Business Brokers, and he stated that his concerns were that the events from 1985 to 1990 were recent and violent, that they were done by a mature man and that the conviction for the assault of Barbara King was not disclosed. Finally, that King is on probation until April 3, 1993, and since it is the policy not to initially register an Applicant who is on probation, the Registrar

would apply that policy as well to King's renewal. To the Registrar, King's offenses raise questions of character and personality when earning commission incomes in a recessionary period brings great stress on a person. He agreed that there is no evidence of any consumer ever being harmed by King, but that the event of the ethics decision brings some concern as to the future.

On cross-examination, the Registrar agreed that a person's interest and enjoyment in a calling would help overcome problems of stress in a poor economy.

Conrad Eggel has been in real estate since 1977 and a broker since 1983. He hired King in 1990 when he noted King's termination from Westshire. He did not know King, but had heard of his activities and presumed that he had been doing well. Eggel agreed that King need not do "desk duty" and that he would generally work from home where he had computer facilities. He was not concerned about any criminal matters since they did not relate to any real estate issues. He learned of the assault on Barbara King much later when Swanson told him, but since Swanson as an employee left Eggel and took salespersons and staff with him, Eggel did not find Swanson credible. Eggel sent a letter of reference for the assault penalty and had King work week-ends. He said that the various criminal matters now fully disclosed in detail did not change his opinion of King whom he is happy to employ. None of the events involve real estate issues or consumers and Eggel believes King to be an honest hard worker who thrives on repeat business. Eggel would agree to any terms and conditions which the Tribunal may impose in order to have King continue.

Barbara King told the Tribunal of her marriage on September 14, 1985 to King. She is the office manager of the Brantford Legion Branch and stated that the assault event of December 26, 1987 was one blow hit while King was very drunk. They did not separate and continued to live together. She has no fear for her safety and both took counselling separately and jointly. She said that King stopped drinking and in the past four years, there has been no repeat occurrence.

She stated that her son and a number of other people were present at the car trashing event. Concerning the assault at the Legion Hall, she said that the complainant was a member of the Branch Finance Committee who came into the office for some information and stormed out after some heated comments when she asked him to wait for a moment. She was new to the job and told King about this event. Several days later King met up with the complainant in the Legion Hall and an altercation led to the

event. She believes that King is a good real estate salesperson who is honest and cares for the wellbeing of his clients.

Gerald King is now 43, and after working at a family business for nine years he joined the City of Brantford staff and progressed through seventeen and a half years from a junior custodian to Market Manager and after three years off work due to an injury, then became by-law enforcement officer. He completed the real estate course in 1987 to improve his job prospects and is now in a business which he enjoys and does well, he said. He wears an elastic brace, has a chronic shoulder joint problem and is on pain medication. He stated that he left Swanson at Westshire because of the failure of support in the ethics event so King no longer wanted to make money for Swanson. He is free to work as he wishes with Conrad Eggel and their arrangement works well. King could not explain his failure to answer correctly on his renewal application about his assault conviction on his wife.

He explained the Legion Hall event as a defence of his wife against a verbal abuse of several days earlier, and noted that he is on the Branch Executive while the complainant has since moved away. While he did not specifically refer to his conviction for his assault on his wife in his support documents to his renewal, he said that he had sent in to the Registrar the materials he received from the Brampton Police Department without looking at them. He said that there had been no event or conviction for any real estate matter with any member of the public.

King wants very much to keep his real estate registration as he has a successful and demanding business and can do well where his injuries would prevent his working in most other jobs. He believes that his convictions have never affected any client and further that any terms and conditions would be a fair penalty for his action, if Eggel would supervise him.

In her summary, counsel for the Registrar noted that the four convictions of King were relatively recent and showed a pattern of physical reaction to problems. In addition, King is on probation until April 3, 1993, and his non-disclosure of the assault conviction on his wife has not been explained. Counsel agreed that King is highly motivated in his real estate practice and his wife, his broker and his clients are all supportive.

Counsel referred the Tribunal to the Brenner decision of 1983 reported at (1990) 19 CRAT 58 where the principal is set out that the Tribunal should only have refused to direct the Registrar to carry out his Proposal if it thought that the Registrar was in error in concluding that the past conduct of the Applicant

afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. She said that as the protection of the public is very important, the Registrar should be upheld since he has acted on reasonable grounds.

Counsel for King agreed that the onus was on him to show that the Registrar in this instance was in error. He noted that the Registrar in the Proposal originally described non-disclosure of two conviction events while in fact there was just one. Further, that any reliance on the evidence of Swanson by the Registrar is suspect due to bias on his part. He said that the three disclosed events were completely unrelated and over a five-year time span. The blow struck by King on his wife and the resultant conviction was not disclosed. This was an isolated event which has been explained and the resultant counselling has led to King not taking any drink since. He suggested that the issues of integrity and honesty do not really arise if the non-disclosure is inadvertent and there has been no deliberate attempt to deceive. He noted that none of the four events had anything to do with any real estate matter and no public member is at risk by the renewal of King's registration.

The Tribunal agrees that the failure of King to disclose one conviction is serious, but accepts his evidence that he sent in the documents he received from the Brantford Police Department so that the error may be inadvertent in this case. While the matter of probation is often cited as a bar to initial registration of a salesperson, the Tribunal finds here that the business record of the Applicant is an important factor in considering a renewal application. In this case, King's real estate relationships are apparently without fault except for the ethics issue as explained to the Tribunal.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal accordingly directs the Registrar not to carry out his Proposal but to renew the registration of King from the date of this decision on the following terms and conditions:

1. That King's registration be suspended for four months from February 1 to May 31, 1992.
2. That for the balance of the term of this renewal, King's registration shall be with Conrad Eggel, who shall supervise and monitor all of King's activities and such registration shall continue during the period unless changed with the consent of Conrad Eggel and acceptance thereof by the

Registrar; and any substituted broker during this period shall agree with the Registrar as to the obligations imposed herein. The sponsoring broker during the term of this renewal shall supervise all real estate activities of King, including approving his advertising, listing agreements and sales agreements and contacting all purchasers and vendors for whom King arranges a completed agreement.

3. The sponsoring broker shall report every two months on the comportment and behaviour of King and that he is fully satisfying the terms of the Real Estate and Business Brokers Act. These reports shall continue during this term of renewal of King's registration unless the Registrar directs otherwise.

KING, MARGARET

**APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION**

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding
JAMES GRAY LESLIE, Vice-Chairman as Member
A.D. MANCHESTER, Member

APPEARANCES:
DOUGLAS E. ROLLO, representing the Applicant

BEVERLY WISE, representing the Registrar under
the Real Estate and Business Brokers Act

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar of Real Estate and Business Brokers rendered September 28, 1989, to revoke the registration of Margaret King as real estate salesperson. In the Registrar's opinion, King was not entitled to registration under Section 6 of the Act as her past conduct "affords reasonable grounds for belief that she will not carry on business in accordance with law and with integrity and honesty."

The first witness to testify was Marion Hetherington, a registration officer with the Real Estate and Business Brokers. She stated that King applied for registration as a salesman under the Act on June 9, 1988 and was subsequently granted registration.

In November 1988, the Registrar's office was notified that King had been arrested on October 24, 1988 and charged with fourteen counts of obtaining secret commissions and one count of fraud over \$2,000.

These charges arose from certain activities of King while employed as a Loans Officer by Royal Trust at 21 St. Clair Avenue East in Toronto from March 1987 to March 1988. Royal Trust alleged that as a result of King's actions, approximately \$500,000 in loans had to be written off as uncollectible. Royal Trust dismissed King from their employ.

On October 29, 1990, all the charges against King were

dismissed upon no evidence being adduced by the Crown. Despite this, the Registrar proceeded with his Proposal to revoke her registration because he found Mrs. King's behaviour to be such that it afforded reasonable grounds for belief that she would not carry on business in accordance with law and with integrity and honesty.

The next witness to testify was Henry Houston. He came to deal with the Royal Trust after seeing an advertisement in the Toronto Sun which read as follows:

PERSONAL financing arranged or funded.
Fred. 867-1670. (see exhibit 15)

After seeing the ad, Houston phoned "Fred" who told him he would see if he could get a loan for him. When he phoned Fred again, he was told that Mrs. King would get in touch with him and that he would receive a loan.

During a phone conversation with Mrs. King, he made an appointment to see her at the Royal Trust office on St. Clair Avenue. When he arrived there, he found that part of the application for the loan was already filled in. It contained the information, he had given to Fred.

He did not know who Fred was and has never met him face to face.

His instalment loan application for \$7,000 was approved by Mrs. King and \$6,500 was used to repay other loans. These were all paid by way of cheques. A final amount of \$500 was provided in cash. Mrs. King took the funds and put them in an envelope saying that these funds represented the fee owing to Fred for arranging the loan. The envelope itself remained with Mrs. King to be picked up by Fred.

In cross-examination, Houston testified that the loan had been fully repaid. He also stated that the envelope containing the cash for Fred was sealed by Margaret King, but had nothing written on it.

The next witness was Bob Thompson, a senior collection officer with Royal Trust. He testified that he had had a long career in the area of loans and collection of loans.

He first noticed Mrs. King's portfolio of loans in the fall of 1987 because of an inordinate increase in the number of delinquent loans. King was the only loan officer at that branch. Ten new loans had become delinquent all at once and none was more than four months old. This in itself was highly unusual. What troubled him even more was that he could not make phone contact

with some of the new borrowers.

In the case of a loan to Dixon, Royal Trust had to write off the balance of \$11,443.89. Upon making inquiries, he discovered that some of the information in the application was false; viz. he was not a widower but was actually paying alimony to his wife, his employment record was also untrue.

He also approached another borrower, Hones, who admitted that the information on his assets was untrue. The loan was written off for \$19,000.

A loan to Shields for \$15,000 was written off with no payments having been made.

False information was also contained in a loan to Santacrouce, the home number listed was false as was the work record.

In the loan to Hortensius, she made one payment only; the loan was written off in May 1988.

In cross-examination, Mr. Thompson stated that when a loan was written off, it went to a different entity connected with Royal Trust known as the collection group. He also testified that the overall delinquency rate in the Royal Trust system during 1987 was from one to one and one-half percent.

The next witness to testify was David Parrott, a security officer with Royal Trust who works on fraud cases. He stated that on March 28, 1988, Mr. Brennan, the manager of Margaret King's Royal Trust branch, informed him that there was a problem at his branch. Brennan thought that Mrs. King had been accepting commissions for authorizing loans by the Royal Trust to certain borrowers.

Mr. Parrott conducted his investigation by talking to various clients who had dealt with Mrs. King and by going through Mrs. King's records. He testified that when Mrs. King was engaged by Royal Trust, she was given a document entitled "Royal Trust Standards of Conduct" (Exhibit 16, tab 15), which specifically prohibited employees from any activity or interest which even gave the appearance of a conflict of interest. This was one of the conditions of her employment in as much as she was acting in a fiduciary capacity, viz.a viz. Royal Trust which depended upon her to make loans of their funds in a manner which was in the best interest of the company. The document invited any employee who had any concern with respect to a situation which could pose a potential conflict of interest to discuss the matter with his supervisor or manager.

Mr. Parrott stated that Mrs. King's lending authority was \$20,000 for secured loans and \$10,000 for unsecured loans; any loans within her authority did not require approval by Mr. Brennan.

He went on to state that sometime prior to her employment with Royal Trust, Mrs. King had opened an account in the name of "GMK Enterprises" and that in her resume presented to the Royal Trust, she had mentioned GMK Enterprises as a personal financial consulting concern which she used for self-employment. She did not, however, disclose any ongoing involvement with this entity beyond 1986.

Parrott reviewed all of the loans approved by Mrs. King by contacting the borrowers and reading the documents. During his investigation, he noted that the phone number for GMK Enterprises was the same as the phone number on "Fred's business card" (Exhibit 18A). The address used by Fred was Mrs. King's home address. Mrs. King and her husband Graham were the sole signing officers of GMK Enterprises.

When speaking to the various borrowers, they all told a very similar story: each borrower first saw an advertisement in the Toronto Sun or Toronto Star that was worded in the same way as the advertisement to which Mr. Houston alluded. Upon contacting "Fred", they were referred to Mrs. King.

Parrott noticed right away that the phone number in the advertisement was the same as that listed for GMK Enterprises and the Kings' residence. Despite trying diligently to find "Fred" whose last name was indicated as being Retzlaffe, he was unable to do so. There was no listing for him in any phone directories or any list of chartered accountants. When he asked Mrs. King about him, she said that Fred worked with her husband out of their home. He told Mrs. King that he wanted to speak with Fred and was told that Fred would call him; he never did. When he informed Mrs. King of this, she said that he had just been married and did not want to talk to him. Despite leaving repeated messages at the number listed in the advertisement, Fred never called him.

From his investigation, he determined that at least 45 loans out of 260 issued had become problem loans, representing a delinquency rate some 18 times greater than the prevailing rate of 1 to 1½%. From his investigation, he estimated that \$7,500, at least, was paid in commissions on loans whose face value was \$363,233, as at June 1988.

He then recounted the interviews he had had with certain of the borrowers whom he had been able to contact. In the case of Mary Davies, she told him that she had paid a commission of \$400

by way of a cheque for \$400 payable to herself which she had then endorsed and cashed. Mrs. King put the cash in an envelope and said that she would give it to Fred.

In the case of a loan to Robert Dillman, the \$400 commission fee was paid by way of a cheque to GMK Enterprises. The cheque was deposited into the GMK Enterprises Royal Trust account viz. the account controlled by Margaret King and her husband.

When Mr. Parrott asked Mrs. King about the GMK account, she told him that it had been set up by her husband and that she had no dealings with it. It was used by her husband for his own affairs, as well as to pay household expenses. That is why she herself also made deposits to the account.

In the loan to Emad Hady, Mrs. King asked Hady for Fred's fee of \$400. It was paid by a cheque payable to GMK Enterprises and deposited on February 4, 1988 into the GMK Enterprises Royal Trust Account.

In the loan to Langlands, the fee of \$600 was paid in cash obtained after endorsing a cheque in the debtor's name. Mrs. King was given the money to pay to Fred.

In a loan to Leville, the commission of \$500 was paid by a corporate cheque payable to GMK Enterprises dated December 16, 1987, and deposited into the GMK Royal Trust Account December 17, 1987.

In the case of the Sahota fee of \$600, Mrs. King took the proceeds on behalf of Fred.

In the Schearer loan, the fee of \$600 was picked up at Schearer's office by someone purporting to be Fred. Payment was by way of cheque payable to GMK Enterprises and was deposited to the GMK Trust Account on December 23, 1987.

In a loan to Schmitt, the fee of \$450 was paid by way of cheque to GMK Enterprises and deposited into the GMK Royal Trust Account December 17, 1987.

In the Leroy Simpson loan, the fee of \$600 was paid in cash which was left with Margaret King.

In a loan to one Sznjader, the \$600 fee was paid in cash by endorsing a cheque payable to the borrower; Mrs. King kept the fund in her possession.

Mr. Parrott believed that commissions may well have been paid on other loans granted by Mrs. King, but was unable to obtain

conclusive proof because of his inability to either reach debtors or get their co-operation. Many of the debtors had "skipped". (see Exhibit 16, Tab 12 to 15).

Mr. Parrott testified that he met Mrs. King on April 4, 1988. At that time, she told him that GMK was run by her husband and admitted that she had received money from clients which, she said, she turned over to Fred. She also admitted that Fred worked with her husband out of her home. At that time, Mr. Parrott told Mrs. King that, in his opinion, she was in a conflict of interest in granting loans to clients as a result of which GMK was to receive a commission as a finder's fee. He stated that Mrs. King agreed with this. He noted that when the interview with Mrs. King began, she tried to make it appear that the finder's fee was paid to a third party and never mentioned GMK or her connection with it.

In cross-examination, Mr. Parrott testified that Mrs. King put the Royal Trust at risk by making loans in which some of the proceeds were to be used to pay her company a commission.

Mr. Orville Cook testified that he was an employee of the Ontario Energy Board. In 1988, he wanted to consolidate certain of his debts into one loan. He saw an advertisement of Fred's to which he responded. He then deposited, as Exhibit 18A, a copy of Fred's business card which he received from Mrs. King at the time he visited her at the Royal Trust branch. The business card reads as follows:

GMK Enterprises

Specialists in Banking and
Financing Advisory Services

FRED RETZLAFFE F.I.C.B. C.A.
President
(416) 867-1670

As has been noted, the number on Fred's business card is the same as that of Mrs. King's residence.

When Mr. Cooke went to visit Mrs. King, he knew that the fee he was to pay was \$700. Before paying it, however, he insisted that Mrs. King give him Fred's business card to be sure that he was dealing with the correct person. He found it strange that he was to pay Fred in cash rather than by cheque and that is why he insisted on receiving the card. Mrs. King put the cash in an envelope. He had wanted to pay Fred by cheque.

To make sure that Fred had actually been paid, Cooke

phoned him later that afternoon and received his confirmation. He asked Fred at that time why the fee was so high and was told that that was because Fred had had to do a lot of work to get to the right person. He said nothing to Cooke about his relationship with Mrs. King's husband or the fact that GMK Enterprises was an entity controlled by Mr. and Mrs. King.

Mrs. Patricia Timmons testified that she wanted to borrow money and had seen an advertisement by Fred in the Toronto Sun. When she spoke to Fred, she asked who would lend her the funds and he said he did not know at that point, but that he would get back to her. Instead, she received a call from Mrs. King to whom she told her requirements. Mrs. King phoned back later to say that the Royal Trust would grant the loan.

She received two cheques representing the proceeds of the loan; one was for \$600 to cover Fred's fee. She endorsed the cheque which Mrs. King then cashed. Mrs. King put the funds in an envelope on which she wrote Fred's name.

Mr. Dermot Brennan, the former manager of the Royal Trust branch in which Mrs. King was employed, testified that he first met her in 1986. During March 1987, she told him she would be willing to take a position in his branch. She had ten years of loaning experience. He engaged her because he thought she was a good underwriter and competent. He gave her responsibility for all loaning in his branch.

She had full authority to grant loans without his approval providing they were \$20,000 or less, on a secured basis, and \$10,000 or less, on an unsecured basis. He did sign all loans together with her even where they did not need his approval because he thought head office required this. In many cases, he signed the loans after they were issued. His signature, as such, did not constitute approval, but rather a countersigning where he felt that two signatures were necessary.

He became suspicious of Mrs. King's activities in 1988. He noticed at that time that certain borrowers living in communities very distant from the Royal Trust branch chose to use that branch. He found this unusual.

Prior to this, he had always had complete trust in Mrs. King. He went on to state that the manager of a branch must always have complete trust in his loan officer because, otherwise, the manager would have to do everything.

Later the explosion of bad loans came to the surface. He found the number of bad loans "catastrophic". For that many loans to go bad in such quick succession indicated more than poor

judgement in the borrower. To him, it also indicated wrongful behaviour by Mrs. King.

As he put it, "No person with Mrs. King's experience and skills could have that many losses so quickly". "No one could make that many mistakes and be legitimate".

When he asked Mrs. King why borrowers came so far to make their loans, her answer was that that's just what they chose to do; she did not tell him about Fred and his referrals.

From her responses, he felt he was not going to get truthful answers; therefore, he began to make his own inquiries. He got in touch with Messrs. Houston and Cook.

Mr. Houston told him about Fred's ad in the newspaper and the \$500 fee he had paid to obtain a loan from the Royal Trust. Mr. Brennan testified that it was highly unusual for a consumer to pay a fee for a consumer loan. He believed that people like Fred are never legitimate, that they prey on lenders by sending them bad business.

He also testified that he would have expected Mrs. King to reveal a source such as Fred for potential business before she acted on it. At that time, he did not realize the relationship of Fred with Mrs. King and her husband.

Had he been informed of Fred prior to Mrs. King using him, he would never have permitted her to deal with him because he did not trust ad driven referral brokers.

Mrs. King never told him about GMK Enterprises or its activities; therefore, he was totally unaware that certain of the fees the customers paid were being deposited to the GMK account.

When he was given Fred's phone number, he recognized it immediately and understood right away the connection with Mrs. King. To him it constituted fraudulent activity and explained the high number of loans going bad. These loans led to an enormous loss approaching some half a million dollars.

He characterized Mrs. King's tenure as a loan officer as a "gravy train" for borrowers.

As a result of Mrs. King's activities and the loan losses that followed, Mr. Brennan had to leave the employ of the Royal Trust Company. This occurred after a very promising career there during which he had reached high levels of management. He felt his career had been ruined because of the abuse of trust by Mrs. King.

The next witness to testify was Lawrence Brown of Equifax Canada, a credit reporting agency. He described how credit reports were obtained.

Mrs. Hetherington was called to the stand again to describe her attempt to locate Fred Retzlaffe. She contacted the Chartered Account Institute and other organizations, but was unable to find any Fred Retzlaffe. She could also find no marriage certificate in his name issued during the month he was alleged to have gotten married.

Mr. Parrott returned to the stand to testify that over \$350,000 of loans booked by Mrs. King had been written off and that at least 40 loans were in default. Both constituted rates of loss which far exceeded the going rate. On the 256 loans which she authorized, the rate of default should have been 3 as opposed to 40.

Gordon Randall, the Registrar of Real Estate and Business Brokers, testified that the behaviour of Mrs. King was clearly unacceptable in that she breached a fiduciary trust. Real estate agents are also in a position of trust and the behaviour of Mrs. King was such that he believed that she would not carry on business in accordance with law and with integrity and honesty. The first and primary obligation of the Registrar is to protect the public. Only those who can demonstrate principled behaviour are entitled to the privilege of being registered.

Mr. Randall also referred to the Notice of Further or Other Particulars with respect to the Proposal to Revoke Registration.

Mr. Randall stated he found that the number of delinquent loans issued by Mrs. King was far beyond the norm. From that he drew the inference that the loans were improper and not just unsound-especially taking into account Mrs. King's ten years of experience as a loans officer.

The breach of a fiduciary trust through a conflict of interest occurred when commission payments were deposited into the GMK Enterprises account which Mrs. King and her husband controlled and on which Fred was not even a signing officer.

Mr. Randall believed that Fred did not even exist, but was used by Mrs. King as a fiction to pay herself an improper commission. Whether he existed or not, she had breached her trust by putting herself into a conflict of interest since GMK Enterprises itself had received commissions.

The fact that the Crown did not proceed with its case and that the cases against Mrs. King were dismissed for that reason did not in any way affect his belief that Mrs. King had acted improperly and was not worthy of being registered.

Mrs. Margaret King appeared as the only witness in defence. She testified that she graduated from Havergal in Toronto and then got her degree from York University. Her husband's name is Graham King.

She admitted that she had opened an account for GMK Enterprises at the Royal Trust branch at which she eventually worked. GMK was originally set up to do financial consulting and/or real estate development.

She confirmed that her authority to lend was within the limits that have previously been mentioned.

She testified that she was approached in the summer of 1987 by Fred Retzlaffe who knew her and worked on deals with her husband to see if she was interested in having him refer business to her. She indicated that she was.

The Tribunal finds it strange that Fred even had to approach Mrs. King in as much as he was a part of GMK Enterprises and worked with her husband.

In any case, Mrs. King went on to testify that she would receive calls from clients of Fred and set up appointments with them to determine whether to proceed with a loan. At the time the loan was agreed to, the clients would inform her of the finder's fee negotiated and she would get the cash and put it in an envelope for Fred. She did not verify the amount of the fee with Fred himself, but would accept the client's word for it.

She also testified that she was in effect in charge of the operation of the Royal Trust branch since her superior Dermot was very often absent. This added substantially to her workload. The Tribunal finds that it also demonstrates the trust which her manager had in her.

Mrs. King stated that she did not know where the bank records for GMK are.

Most importantly, Mrs. King admitted that certain fees paid by borrowers may have been deposited into the GMK account. In later testimony, pursuant to questions by the Tribunal, she in fact admitted that she knew of fees having been deposited into the GMK account on a number of occasions.

In cross-examination, Mrs. King stated that she and her husband were the sole signing officers of GMK Enterprises and that her husband may have been President and herself Vice-President.

She testified that she never informed her employer about GMK and its activities, because she herself was not active in GMK. The Tribunal notes, however, that the entity was controlled by Mrs. King and her husband and yet that Fred himself was publicly held out to be the President of GMK. She admitted that she had business cards of Fred which listed him as President of GMK. She also acknowledged that Fred's role was to get fee income for GMK by referring business. She also admitted that the phone listing was for her home phone number. She stated that Fred very often worked out of her home and received phone messages there.

She stated that the initials appearing on certain deposit slips by which fees were deposited to the GMK account were of her husband. In Tab 8, deposits were made by her husband on four separate occasions.

As for Fred, she claimed that he exists even though she does not know where he is.

Mrs. King denied any wrongdoing, but said she would never again handle referrals from anybody.

In response to certain questions by the Tribunal, Mrs. King admitted that GMK Enterprises received the proceeds of finder's fees for at least a dozen loans referred by Fred. She also admitted that cheques were drawn on the GMK account to pay household expenses. She stated that she perceived no conflict of interest because she herself did not receive the fees directly, but upon further questioning admitted that because GMK Enterprises was operated by her husband and the proceeds of loans were deposited to the GMK account to which only she and her husband had access, that there may well have been a conflict of interest.

In argument, the attorney for Mrs. King accepts that a conflict of interest existed when Mrs. King made the loans in as much fees were being earned by an entity in which Mrs. King's husband was involved on loans which Mrs. King had to approve on behalf of Royal Trust.

Counsel for Mrs. King felt, however, that her breach of trust did not justify her licence being revoked.

The Tribunal finds on the basis of the proof made, as well as of the admissions of Mrs. King, that she breached a relationship of trust with the Royal Trust Company. She had the obligation to inform Royal Trust at the beginning that a commission

was going to be paid to an entity in which her husband played an active role and from which she and her husband derive income.

The Tribunal further finds that because GMK Enterprises would receive a fee for loans granted by the Royal Trust, it would have been very difficult if not impossible for Mrs. King to remain objective when deciding which loans to approve.

The fact that so many loans went sour gives rise to the presumption that Mrs. King was being induced to approve loans to debtors she knew or should have known were unworthy. The presumption can also be made that had there been no finder's fees, the substantial loan losses of the Royal Trust would have been prevented.

Does the behaviour of Mrs. King constitute valid grounds for revoking her registration as a real estate salesman? Is the sanctions sought by the Registrar out of measure with the wrongful acts of Mrs. King. Counsel for Mrs. King says that it is.

The test which the Tribunal must apply was set out in the case of Brenner vs. Registrar of Motor Vehicles by the Divisional Court, in 1983, in which it stated that:

Unless the Tribunal can find that it (past conduct) does not afford reasonable grounds the Tribunal should not order the Registrar to refrain from carrying out his Proposal.

The question before the Tribunal, therefore, is whether Mr. Randall exercised his discretion reasonably in the present case.

The Tribunal believes that he has. The breaches of trust by Mrs. King were very significant and led to very serious consequences. One man's career, Mr. Brennan's, was destroyed at the Royal Trust Company, Royal Trust itself suffered enormous losses, losses which probably would have been substantially avoided had the conflict of interest not existed. In addition, Mrs. King showed no remorse either towards Mr. Dermot Brennan or the Royal Trust. She did not seem to grasp the enormity of her breaches.

Under the circumstances, therefore, the Tribunal finds that the Registrar exercised his discretion reasonably in making his Proposal that the registration of Mrs. King be revoked.

The Tribunal refers to the case of Rana in which the judgement was issued January 9, 1991 by the Commercial Registration Appeal Tribunal.

The Tribunal also followed the case of Israel Jakobs (1987) CRAT 223 at p.226 where it held:

However, the offences for which Mr. Jakobs was convicted showed a very serious breach of trust. Quite aside from the financial loss suffered by the owners of the stolen diamonds, through his actions, Mr. Jakobs placed the reputation of his employer in jeopardy. Only the financial loss is being rectified. An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act. "Integrity and honesty" are not merely words. They are standards that must be met. While the onus is on the Registrar to show that a person is disentitled under the Act to registration in the circumstances such as those before us, the Applicant must establish that his conduct and character will be unimpeachable and that there are no reasonable grounds for belief that he will not act in accordance with these standards.

In Mrs. King's case, there has been no restitution made to the Royal Trust for losses incurred. In fact, Mrs. King has never even acknowledged any wrongdoing to the Royal Trust.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

MICHAEL KUPIEC

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
JOHN HARVEY, Member

APPEARANCES:

JANE WEARY, representing the Registrar under
the Real Estate and Business Brokers Act

No one appearing for the Applicant

DATE OF
HEARING: 27 November 1991

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a decision of the Registrar of Real Estate and Business Brokers made by way of a Proposal dated January 15, 1991. Exhibit #2 filed at the hearing established that on September 27, 1991, a copy of the Appointment for the hearing at 9:30 a.m. on November 27, 1991 was sent by prepaid registered mail to the Applicant at the address given by him. He did not appear at 9:30 a.m. and the Tribunal waited until after 10:00 a.m. to commence the hearing which it then did in the absence of the Applicant or of anyone representing him.

The Tribunal was advised that the office of the Registrar of Real Estate and Business Brokers had ascertained over a week ago that the sponsoring broker who had signed the Applicant's application for a licence had withdrawn his support, and that the Applicant at that time did not have a sponsoring broker. In a telephone conversation last week, between the Applicant and an official with the office of the Registrar of Real Estate and Business Brokers, the Applicant had stated that he would obtain a new sponsoring broker and would appear at the hearing.

At the opening of the hearing, the Tribunal was further advised that the Applicant had telephoned the Registrar of the Tribunal this morning November 27, just after 10:00 a.m. from Penetanguishene, Ontario, advising that he was still seeking a sponsoring broker and that he could come to Toronto to attend the

hearing later in the day. It appeared from certain exhibits filed that the letter by way of notice of appeal of the hearing from the Applicant indicated that he had received the Registrar's Proposal from which he was appealing on February 1, 1991, that he had sent in his letter by way of appeal there from, which was received on February 11, 1991, that this letter did not indicate under which Act his application had been made and this appeal was being brought and no copy of the document was enclosed.

Then on February 11, 1991, the Registrar of the Tribunal wrote to the Applicant advising that before action could be taken upon his request for a hearing, he should provide this office with these documents. On April 15, 1991, the Registrar of the Tribunal wrote again to the Applicant stating that no reply had been received to the letter of February 11 and repeating the request. On May 29, 1991, the Registrar wrote again to the Applicant stating that no reply had been received to the letters of February 11 or April 15 and again repeating the request, this time sending copies of this letter to the Registrar of Real Estate and Business Brokers. As a result of this last communication with the office of Registrar of Real Estate and Business Brokers, counsel in that office forwarded to the office of the Registrar of the Tribunal copies of the required documents in order to expedite the hearing. It appears that no response to any of this correspondence was ever received from the Applicant.

It was the conclusion of the Tribunal that in all of the circumstances of this matter which we have set out briefly above, the Tribunal should grant the application made by counsel aforementioned. The Tribunal wishes to add that, if the effect of granting this application were to preclude finally any opportunity for the Applicant to pursue a career as a real estate salesman, the Tribunal might have concluded that it should adjourn the hearing to give the Applicant a further opportunity to present his case. However, if the Applicant seriously wishes to do this, he can start all over again with a new application which, if he is serious about it, he should pursue properly at each stage, something which he did not do with this appeal.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant's registration.

DONALD MILES

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
A.D. MANCHESTER, Member

APPEARANCES: RALF R. JARCHOW, representing the Applicant

ALVIN TORBIN, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF 12, 13, 14 June 1991
HEARING: 2 August 1991

Toronto

REASONS FOR DECISION AND ORDER

At all material times, the appellant Donald Miles was a real estate broker registered under the Act laterally as an associate broker with Century 21 Town Centre Real Estate Ltd. He applied for renewal of licence by application dated 26 January 1989 which the Registrar has refused on the grounds that under Section 6 of the Act, the applicant by his past conduct will not carry on business in accordance with law and with integrity and honesty.

As a result, the Registrar has issued a Proposal to revoke the appellant's licence which now becomes the subject of this appeal.

Miles, a young man of 33 years of age, has been in the real estate trade for some nine years having been first registered on September 1, 1982. He resides at 22 Chickadee Crescent, Brampton where the family of one Miss X (see Note) had taken up residence a year before the incident in question. Miss X was 14 and had been the babysitter for Miles and his wife since apparently the families had become friends.

On September 1, 1988, Miss X was babysitting for Miles when he returned home at approximately 11:00 a.m. after playing golf. The evidence is that he lay on the floor complaining of a back ache and asked the girl to sit on him as he lay face down. The girl responded to his request by straddling him and then he turned over, removed her glasses and kissed her. As he undid his

zipper, she moved away and sat on the couch. He then sat next to her, pulling down her jeans, and massaging her vagina. There was apparently a noise outside which startled the girl and she jumped up, moving to the window but then returned to the couch. It appears the massaging continued and Miles removed his penis from his trousers and asked her to put her hand on it which he succeeded in doing. The girl immediately pulled away from him and went upstairs to check on the Miles child. He then went up to the bathroom, took a shower, and changed his clothes. He then apologised to her and asked her not to tell anyone.

Miles was charged under Section 153(1)(a) of the Criminal Code of the offence of

being in a position of trust or authority towards Miss X, a young person, for a sexual purpose, touch Miss X, contrary to Section 153(1)(a) of the Criminal Code...

He was convicted after a plea of guilty and sentenced to six months in jail and two years probation on August 9, 1990 at Brampton. The appellant is still on probation having served two months of the six months of his sentence.

The unfortunate incident had a traumatic effect on the girl as the report of her psychiatrist indicates and as her father Mr. X recounted in his evidence. He said the family had moved into the neighbourhood about 12 months before the offence occurred, but the impact on the child and the family was so severe, they were obliged to move from the area shortly thereafter. It appears the girl suffered emotionally from the experience and was taken to a Dr. Alcock, a psychiatrist, for treatment. His report was admitted in evidence, Exhibit 16.

Mr. X continued saying his daughter appears to avoid the company of boys at school becoming somewhat introverted. She had not been able to tell him about the offence at home, but called him on the telephone the following Sunday to disclose it. As a result, he discussed the matter with Miles who said he was a pervert and promised to take counselling. Although Miles offered to move from the area, Mr. X preferred to sell his home. He pointed out that after about twelve visits to Dr. Alcock and the sentencing of Miles, his daughter did not require any further treatment.

In a subsequent incident on January 5, 1989, Miles was in his car behind one David Scott at a fast food outlet waiting for service. They were both waiting for service and Miles it appears became impatient with Scott's failure to remove his vehicle from his path. Scott, giving evidence in the matter, said Miles came

up to his car window and told him to move it before he put his fist through it. Miles then struck him with his fist in his left eye and as a result, he lost two days work and had to wear an eye patch. It appears he sued Miles in the Small Claims Court for damages and settled for \$250.

Scott said he used to work at a racquet club where Miles was a member and found him to be an arrogant and abusive person to the staff. The two met at a later time at the club after Miles apologized to him and Scott bought him a beer. As a result of this offence, however, Miles was charged with assault under Section 266 of the Criminal Code on January 5, 1989 and after entering a plea of not guilty was convicted on March 12, 1990 and fined \$300.

Marion Hetherington, an employee in the Registrar's office responsible for checking and reviewing applications under the Real Estate and Business Brokers Act, in her evidence said that she had received a telephone call advising of Miles' convictions. She then reviewed Miles' application for renewal dated 26 January 1989 and which was received on February 21, 1989. Question 6 on the application dealing with convictions or charges pending was answered incorrectly when the answer "No" was ticked off. Realizing this, she checked with the police to determine if the information was correct.

Mr. Gordon Randall, the Registrar of Real Estate and Business Brokers, in his evidence pointed to his concerns which involved the failure of Miles to disclose the pending charges on his application, and the nature and type of offences resulting in the convictions. He observed that the charges of sexual exploitation and assault were both pending when Miles filed his application received 21 February 1989, the former on October 26, 1988 and the latter on January 5, 1989.

Mr. Randall recalled a meeting with Miles and Ms. Hetherington at his office on October 23, 1990. The meeting was requested by Miles because of his concern for the future of his business. It appears Miles had just been released from custody and his primary concern was his future in real estate. Although he did not mention the assault charge, he discussed the other offence, appearing to consider it of a minor nature since it was an isolated incident and the girl, he said had a crush on him.

In issuing the Proposal to revoke Miles' registration, the Registrar said he had to consider Miles' position in the community and his appearance therein as a result of being registered. He considered the sexual offence tantamount to rape because of its emotional implications and the assault certainly conduct unbecoming a mature business person. The sexual offence

was offensive to him and the perception flowing from it equally offensive. The offense was compounded by the fact that trust was a major factor and that trust had been broken. The victim, he said, was a neighbour in Miles' employ and a 14 year old girl should be able to feel safe instead of threatened by her employer's conduct.

Putting his reasons for refusal as succinctly as possible, the Registrar said the public when they invite someone into their homes are entitled to expect trust and honesty from that person. Public perception is important and other agents would be concerned about what would happen if they were to have Miles enter their customer's homes. Finally, the failure to disclose the charge arising therefrom and the fact that the appellant is still on probation all militate against his continuing registration.

In his defence, the appellant called Ann Best as a witness. She had been employed as an administrator in the office of Century 21 Town Centre. Ms. Best testified she handles the legal documents, bookkeeping and telephone for the firm and had completed the application for renewal of January 26, 1989 and simply placed it on Miles' desk for signature. She apparently had no discussion with Miles about it and she was not aware of any offences with which he was charged.

Tina Lohmes was the next witness called. She was the office manager that left the office in July 1989. She related the events of an office cruise when Miles fell in the water and went back to her office to dry out. She said he attempted to lie on top of her on an office couch, but she was offended and pushed him off. It was, she said, both unexpected and unprovoked.

James Townsend, an agent who joined Miles' firm in 1988, testified he had always received excellent advice from Miles and that ethically he gets "full marks". It is a happy office he said with high morale. He observed that about five people had left.

A man who had known Miles' father (also a real estate broker when Miles Senior opened his brokerage in 1982) gave character evidence on behalf of Miles. He said Miles Senior when he was leaving to go to live in Western Canada in 1987 asked him to advise his son on real estate matters. He said he had a number of transactions with the appellant and all deals were clean. He is ethical and conducts a clean business he concluded. He admitted, however, on cross-examination that his relationship with Miles had been on a purely business basis and he really did not know him socially.

The appellant giving evidence on his own behalf said he

had not completed high school, but that he had taken many real estate courses. Registered initially in 1982, he worked as an agent until 1987 when he transferred to his father's company Century 21 Town Centre as a broker and as a broker took over the business when his father moved to Western Canada. His sister is also an associate broker in the firm and received his shares which he had transferred to her in September of 1990 when he went to jail. It is clear that the firm has done well with few liabilities and is a solid company. He said he had learned from his father's teaching "Let's do it right - don't put anyone in jeopardy here". The business seems to have prospered accordingly.

On the issue of his renewal application, Miles said he simply signed the completed form and we are prepared to accept that evidence which is consistent with that of Ann Best. We do, however, question his assurance that he was not fully conversant with the substance of question 6 regarding pending charges. He had completed the real estate courses which emphasise the correct completion of the applications and being in the business since 1982 had been obliged to complete them on previous occasions. He does contend, however, that he did not intend to mislead the Registrar deliberately and it may be that his action arose only out of simple carelessness. He further stated he knew it was an offence to supply false information and he was not attempting to hide anything. We appreciate that in a busy office that the filling out of forms may not be of primary consideration, particularly when they are left for a secretary to complete and, therefore, take no issue with the appellant on this point.

With regard to the incident at the drive-in restaurant where the assault on Scott took place, Miles contended he did not intend to strike him and that it was simply an accident. On all the evidence, however, we are of the view that it was an intentional and provoked assault by a man impatient to have his own way regardless of the consequences.

Admitting responsibility for the sexual offence against Miss X, Miles said "he acted out an immature seduction on a 14 year old girl. I knew there was a relationship developing there and I should not as a 30 year old man have allowed it to happen...I would not put myself in a position to go back to jail under any circumstances". He has paid a high price for the offence and the fact that he has taken counselling and treatment from a Dr. Byers is a reflection of his contrition.

With regard to his business, he pointed out that the last audit was done in May 1990 by an investigator from the Ministry and he was given the compliment that "those are the best set of trust account books he had ever seen." Asked on cross-examination by Mr.

Torbin about an incident at the Georgetown Golf and Country Club where he was alleged to have taken down his trousers and exposed his buttocks to junior members, he replied that he did not recall it.

Called in reply by Mr. Torbin, a David Kemshead said that as the golf professional at the Georgetown Golf and Country Club, he received a complaint from some junior members of the Club (between 12 and 14 years of age) about someone pulling his pants down on the golf course. He confronted Miles about it who then apologised and said he would not do it again. Kemshead then advised him if there was a recurrence of it, his membership would be suspended.

Delia Christine Janes was the next witness called by the Registrar. She had been a real estate agent since 1987 and originally employed by Miles' father. She said she had heard about an office party on Miles' boat and told him the next time he held one, she would like to go. Miles arranged to take her to what she assumed to be a boat party, but when they arrived, there was no one else there. Although apparently surprised, she went out on the boat with him, but when he began fondling her she resisted. She said they were out in the middle of the lake but he did not force sexual intercourse on her. It appears she pushed him away from her and at that point, he began masturbating in front of her. They then returned home and shortly thereafter she left his employ.

Tina Lohmes returned to the stand in reply. She became sales manager of the business in 1988, but left in July 1989 after some unpleasantness which had arisen between her and Miles over her future earnings. She had been earning \$60,000 annually as a salary and he wanted it changed to a commission only basis. She said her relationship with Miles had been one of mutual respect as far as business was concerned, although he was obnoxious and arrogant. Of office complaints, she remarked that the girls were frequently complaining of sexual harassment as a result of which, some female agents had left the business. She said her advice to Miles was that "he should keep his penis in his pants." On cross-examination, she said that despite their differences, she harbours no resentment towards Miles.

In argument on behalf of the Registrar, Mr. Torbin asks for the revocation of Miles' registration on the grounds that he has demonstrated a breach of trust in his conduct that can lead to no conclusion other than that it falls squarely within Section 6 of the Real Estate and Business Brokers Act and that the Registrar is not wrong in his refusal (re Brenner and the Registrar of Motor Vehicle Dealers and Salesmen). He points to the breach of trust in the relationship between Miles and the 14 year old girl, the

breach of trust between neighbours and the breach of trust between employer and employee, specifically with reference to the incident with Delia Janes.

He further points to the unprovoked assault upon Scott, a smaller man, the two convictions and the fact that Miles is still on probation, a circumstance not countenanced by the Registrar (*re Patrick Doherty*). In conclusion, Mr. Torbin asks the Tribunal to take a serious view of the non-disclosure in the January application.

In reply, Mr. Jarchow contends Miles seems to have thought question 6 on the January application referred only to convictions. We pay little attention to forms and often sign them carelessly, he said, particularly when they are completed by another.

With regard to the assault upon Scott, he points to the plea of not guilty (even though there was a conviction), because Miles felt it was an accident.

The incident with Miss X, he contends, was an aberration never likely to be repeated with anyone else and that Miles has demonstrated genuine contrition in at least two respects. He offered to move away from the neighbourhood prior to the X family moving and he has successfully taken psychiatric treatment. He also refers to the plea of guilty saving the family a traumatic court appearance and the fact that Miles has paid his debt to society.

In conclusion, he contends that none of the offences are related to the business except perhaps the error on the January application and that was completed by another party who at that time knew nothing of the offences.

This is an unfortunate case of a young man whose business and social conduct have been soiled by his own vulnerability to his uncontrolled passion. Clearly he required psychiatric treatment, which he voluntarily sought, realizing his desperation at times for sexual relief. It appears from his evidence that treatment has been successful and he has taken full responsibility for his behaviour. He is contrite and considers he has paid his debt in full to society.

Nevertheless, there are issues which remain and which trouble the Tribunal. One of them is credibility. The difference in the evidence between Miles and Scott which led the Tribunal to the conclusion Scott was telling the truth and that the assault was not an accident. There is the disparity in the evidence of

Delia Janes and that of Miles when he indicated a sexual union had been voluntarily consummated. She said it had not and this Tribunal is disposed to believe her, particularly since she has no interest in the result of this appeal.

There is also the continued sexual harassment of his employees which may or may not continue.

The case of David Grunberg (1990) 20 CRAT 466 is not dissimilar. Grunberg had been convicted of rape eleven years prior to the hearing and in its decision to refuse registration, the Tribunal said:

The decision of the Registrar is based on continued public perception of the Applicant's criminal conviction. There is no evidence that the Applicant would not carry on business in accordance with law and with integrity and honesty. However, due to the nature of the crime, it would be correct to assume that the Applicant would be continually vulnerable and, therefore, such vulnerability may lead to his inability to carry on business with law and with integrity and honesty.

We concede that Miles was not convicted of a crime as serious as rape, but his past conduct has led us to conclude that a situation may again arise when he finds his passion beyond his control. This is one factor for our consideration, but it is by no means the major consideration in this decision.

The fact that the appellant is still on probation is the one issue that we cannot ignore. The Registrar has said he considers the sentence is not complete until the probation ends and the policy of his department is not to permit the registration of an applicant on probation. This has been upheld in many decisions of this Tribunal.

Miles is young, appears to be devoted to the real estate trade and in the meantime the company is being operated, not unsuccessfully, by his sister. When he has completed his probation, he may apply under Section 10 of the Act for registration which at that time may not be looked upon unfavourably by the Registrar.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

* Note: In order to protect the confidentiality of the young person and her family, her name and that of her father have been deleted from the original decision and replaced with the terms Miss X and Mr. X for the publication of this decision.

MAHMOUD M. MOHAMMAD

APEAL FROM THE PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
RICHARD F. STEPHENSON, Vice-Chairman as Member
A. DONALD MANCHESTER, Member

APPEARANCES:

JANE WEARY, representing the Registrar of
Real Estate and Business Brokers

No one appearing for the Applicant

DATE OF
HEARING: 23 July 1991 Toronto

REASONS FOR DECISION AND ORDER

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

NASTAT REALTY INC. and
SAM NASTAT

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATIONS

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
MAURICE LAMOND, Member

APPEARANCES:
SAM NASTAT, its agent and on his own behalf

CHRISTINA CHRISTOPHE, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF 23, 24, 26 September 1991

HEARING: Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Sam Nastat and by Sam Nastat Realty Inc. from the Proposal of the Registrar to revoke both the personal registration of Mr. Nastat and that of his company as real estate brokers.

The company has been operating out of Mississauga as a real estate brokerage firm and Mr. Sam Nastat otherwise known as Sadallah Nastat is the sole owner. The Proposal of the Registrar recites the following grounds for revocation of both registrations:

1. In the Registrar's opinion, Nastat Realty Inc. is not entitled to registration under Section 6 of the Act as the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty.
3. In the Registrar's opinion, Nastat Realty Inc. is not entitled to registration under Section 6 of the Act since, having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business.

The same reasons are given for the revocation of the registration of Sam Nastat.

5. In the Registrar's opinion, Nastat Realty Inc. and Nastat are not entitled to registration under Section 6 of the Act as they are carrying on activities that are in contravention of the Act.

The Proposal arose out of a complaint received by the Registrar from a firm of lawyers indicating neither they nor their client had received the return of a deposit of \$25,000 paid to Mr. Nastat's company on a real estate transaction which subsequently failed to close. From the evidence of a Mr. Jerry Szczur, it appears he entered into an agreement to purchase a property at 370 Admiral Drive in London on February 7, 1990 tendering \$5,000 as a deposit with the Offer and on March 6, 1990 after a waiver of conditions had been executed by the parties, he advanced a further \$20,000 with the transaction scheduled to close on April 10, 1990. A term of the Agreement between the parties was that the deposit was to be placed in a interest bearing account. For reasons which are unclear but are not material to this decision, the transaction did not close; the vendor and purchaser having entered into a Mutual Release thereby terminating the Agreement on April 5, 1990. A Direction also signed on April 5, 1990 by the purchaser Szczur was faxed to Nastat that day which reads:

You are hereby authorized and directed to return the deposit of \$25,000.00, and any accrued interest pursuant to the Agreement, (less the amount of \$2,500.00 which is to be paid directly to Flett, Beccario, Crouch, Quinn & D'Amico in Trust), to Jerry Szczur in Trust c/o Lipton & Lipton, Barristers & Solicitors, 40 University Avenue, Suite 808, Toronto, Ontario, M5J 1T1 and this shall be your good, sufficient and irrevocable authority for so doing.

DATED at Toronto this 5th day of April, 1990.

" _____ "
JERRY SZCZUR IN TRUST

Since the Direction had not been honoured by Nastat, Messrs. Lipton & Lipton, barristers, etc., on April 10 demanded the deposit

by letter to which was attached a copy of the Release. The letter reads as follows:

We enclose a Mutual Release executed by both the purchaser and the Vendor respecting the above transaction and would ask that the full deposit with interest, less \$2,500, be returned and forwarded directly to our firm by tomorrow at 4 p.m. We would ask as well that you forward the remaining \$2,500.00 to Flett, Beccario, Crouch, Quinn & D'Amico in Trust pursuant to the Direction that was previously faxed to you.

We appreciate your efforts in this regard and wish to advise that neither the Purchaser nor the vendor is desirous of reviving this transaction.

Thank you in advance for your anticipated co-operation in this matter.

Yours very truly,
LIPTON & LIPTON
PER:
"Wayne C. Lipton"

The same day Mr. Wayne Lipton called Mr. Nastat concerning the return of the deposit and it appears that he was advised no refund would be made since the funds were being applied to Nastat's commission and that they were "unavailable". On April 11, 1990, Lipton wrote to the Ministry of Consumer and Commercial Relations outlining the facts and requesting an investigation.

Brian Prendergast, an investigator with the Ministry, was appointed to deal with the complaint and in his evidence said that a meeting was held at the Ministry with Mr. Nastat on May 8, 1990. Nastat advised him the money was in the account, but produced no trust records which he was expected to do. As a result, Prendergast telephoned the bank and was advised by the manager that the sum of \$25,053 was on deposit that day, but refused to disclose any further information about the account. Later that month on May 29, Prendergast received a fax from Nastat which read:

1. The deposit plus the interest have been paid to the purchaser in full.

2. All the legal actions against my company and my self have been ceased (sic).
3. I will bring to your office within two days all the cheque stubs, the cancelled cheques and the bank statements.

"SAM NASTAT"

Attached to the faxed message was a photostatic copy of a cheque for \$25,250 dated May 28 and drawn on the trust account of Nastat Realty Inc. #690-2618. The cheque was payable to "COCKBURN & FOSTER IN TRUST" (Exhibit 25).

Not satisfied with Nastat's failure to produce his bank statements and trust ledger, Prendergast obtained authority from Nastat to obtain them. And still dissatisfied with the result, he obtained an order on July 25, 1990 freezing the accounts.

From the evidence, it appears that Nastat had three accounts with the C.I.B.C. with which we are concerned - the trust account #690-2618 held in the name of Nastat Realty Inc.; the general account #690-2510 also in the company's name; and a third account #48-02039 of which we know little, but which Mr. Nastat maintained was a business account.

Production of the accounts revealed that on February 28, 1990, the balance in the trust account was \$12.38, but on February 9, 1990 a deposit of \$5,000 was made representing the \$5,000 deposit received in the Szczur transaction. We do not, however, have the benefit of the February bank statement reflecting the previous transactions in the trust account. Exhibit 31 representing the March statement of the trust account indicates deposits of \$30,000 and withdrawals of \$30,006 leaving a balance in the account on March 30 of \$6.38. The sum of \$20,000 deposited on March 7 appears to coincide with the deposit slip (Exhibit 30B) and are the funds received from the further advance made by Szczur in the contemplated purchase of 370 Admiral Drive.

During the same period, the company's general account showed an overdraft on February 28 of \$14,140.88. On March 7, a deposit was made into it from the trust account of \$15,000. A further deposit of \$5,000 from the trust account to the general account on March 16 (Exhibit 34) and on that date the overdraft of \$9,464.59 was reduced by \$5,000. The trust account, however, was left with \$12.38 and on March 30, \$6.38 remained in it.

The intitial deposit of \$5,000 by Szczur was made into the trust account on February 9 according to the deposit slip (Exhibit 30A). What happened to these funds is conjecture because we do not have the benefit of the February statement for the trust or general accounts, and cannot determine whether or not they were transferred from trust. It is evident, however, that only the sum of \$12.38 remained in the trust account at the end of the month.

Unfortunately, we have not been favored with the bank statements of the trust account for April. It may be assumed, however, that there was no activity in the account for that month since the statement for May reflects a balance in the account of \$6.38 the same figure as at the end of March.

Similarly, there are no deposits made into the general account during the month of March which discloses an overdraft at the end of the month of 12,247.84.

Mr. Nastat had in the meantime sold another property from which he was to obtain a commission of \$75,000. This transaction closed and the commission was paid into the trust account on May 2, 1990. After some withdrawals or transfers, there was a balance in the account of \$25,053.88 on May 8, the same date he attended at the Ministry for his meeting with Mr. Prendergast. The amount was confirmed by the bank manager pursuant to the call from Prendergast. On May 28, Nastat tendered his cheque for \$25,250 to Messrs. Cosburn and Foster in trust which represented the return of the deposit, together with interest. This cheque (Exhibit 25) was drawn on the trust account #690-2618, but the bank statement (Exhibit 35) for that month indicates there were no funds left on deposit as of that date. The only conclusion left to us is that the cheque although dated May 28 was not delivered or negotiated until June, but we have no bank statement for the trust account for the month of June in evidence.

Mr. Szczur, however, in his evidence said the cheque was not received until May 30 and was deposited on June 5. Since it appears to have been honoured, we must infer that further funds were placed in the trust account in order to cover it. Mr. Nastat did not appear to maintain a trust ledger and as a result of his investigation, Mr. Prendergast laid charges against him under section 19(2) and 21 of the Real Estate and Business Brokers Act. The disposition of these charges which was reserved until a later date was not a matter before this Tribunal and is, therefore, not relevant to this decision.

During the Prendergast investigation of Mr. Nastat's affairs, the Registrar conducted a search to determine whether or not there was any criminal record involved. He also reviewed the

applications of Nastat and of the company for registration. As a result of the disclosures arising from his searches, he served a Further Notice or Other Particulars on Mr. Nastat and the company which contains the following allegations:

19. The Office of the Registrar conducted a criminal record search against Nastat, which search revealed the following:

<u>Date and Place</u>	<u>Charges</u>	<u>Disposition</u>
July 17/75 London	Indecent Assault on a Female	Conditional discharge for one year
Oct. 20/89 Brampton	Mischief Sec. 430 cc	Conditional discharge & probation 3 months

20. Nastat, by way of application dated April 25, 1989, applied for registration as a broker under the Act. Question 6 of that application reads "Have you ever been convicted or found guilty of an offence under any law or are any charges now pending? If yes, attach full particulars on a separate signed and dated statement. NOTE: Where the applicant has been previously registered, list only those convictions which have occurred since the date of last filing.", and Nastat replied "No".

Therefore, Nastat failed to disclose the charge of Mischief that was pending against him. Nastat also failed to disclose the finding of guilt and conditional discharge he received in respect of the charge of Indecent Assault on a Female.

24. Nastat, by way of an application dated July 16, 1991, applied for renewal of his registration as a

broker under the Act. Question 10 of that application reads "Have you ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered. If yes, attach full particulars on a separate signed and dated statement. Note: Where the applicant has been previously registered, list only those convictions, conditional discharges, absolute discharges or charges which have not been previously disclosed.", and Nastat replied "No". Therefore, Nastat failed to disclose the findings of guilt and conditional discharges he received in respect of the charges of Mischief and Indecent Assault on a Female.

Nastat also failed to disclose the charges of contravening sections 19(2) and 21 of the Real Estate and Business Brokers Act that are pending against him personally.

The same allegations were repeated in respect of the applications of Nastat Realty Inc. of which Sam Nastat is the sole officer.

The documentary evidence submitted on behalf of the Registrar in the form of the many exhibits filed and the admissions of Nastat enjoins us to find as a fact that the allegations have been proven beyond doubt. There is, therefore, no necessity for this Tribunal to deal further with that evidence.

Our prime concern in this matter is whether or not Mr. Nastat and through him his company have properly discharged the trust obligations imposed upon them by the Act. In his meetings with Mr. Prendergast, Nastat maintained the deposit monies were in reality his property having earned the commission whether or not the transaction closed. He has so contended before this Tribunal and again in his argument (since the parties agreed to submit written argument). On page 2 of his submission, he contends referring to the Proposal and section 20 and section 19 of the Act:

- a) Not returning the deposit as required by the release,
 - 1 - Objecting to the way the agreement was aborted (Colins letters)
 - 2 - Having similar case in B,C, (Exhibit (sic) 63) last paragraph
 - 3 - The release required me compulsory (sic) to waive out my claims on my commission (Exhibit (sic) 23)
 - 4 - The collaboration made between two lawyers where even the vendor's lawyer was paid by the purchasers \$2,500,00 (Exhibit (sic) 22)
 - 5 - The property was sold by me to the vendor less than one year before and there was NO TITLE PROBLEMS
 - 6 - Nastat did inform the legal department of his intention not to return the deposit to the purchaser until he finds through his lawyer the fabricated reasons for aborting the agreement (Nastat stated in the testimony that he approached Mr. Don Bourgouise (sic) in the legal department of the ministry of consumers in this regard
 - 7 - On the interim agreement (above the signature (sic) of the vendor) there is a paragraph stating that the commission can be deducted from the deposit
 - 8 - The release binds the Real Estate Agent only if the agreement was subject to condition precedent (sic) not after signing the waiver, where after that time the agent has legal claim on the commission
 - 9 - I had exclusive listing on the property at the time of the sale

The difficulty we have with his reasoning is twofold. Nastat was provided with a Direction from the purchaser's lawyers to return the deposit monies to them payable to Szczur in trust. Under the terms of the Offer, the commission was to be deducted from the deposit on closing, but payable by the vendor. The funds Mr. Nastat's company held were those of the purchaser. Nastat was the vendor's agent and at no time did he have a claim on the monies tendered to his office on behalf of the purchaser until

after the transaction closed. It did not close and the funds should have been returned upon receipt of the Direction.

Further, if he felt aggrieved at the manner in which the parties terminated the contract, he had the opportunity to assert his claim in the proper forum against the offending party. The solicitors for the purchaser maintained there were title problems and which requisitions the vendor was unwilling or unable to satisfy.

In this dispute, Mr. Nastat could assert no legal claim to the purchaser's deposit.

The more serious aspect of his handling of the deposit monies, however, arises from its apparent absence from the trust account. The initial deposit of \$5,000 was made into the trust account #690-2618 on February 9, but on February 28 only \$12.38 remained in the account. The second deposit of \$20,000 was entered into the account on March 7, but on March 30 only \$6.38 was left in the account.

There is evidence that both deposits were immediately transferred to the general account which was substantially in overdraft. No further funds were placed in trust until May 2 when the commission of \$75,000 was deposited therein (by mistake according to Mr. Nastat's evidence) and at no time during the month of May were there sufficient funds to return a deposit of \$25,000, together with the interest.

A term of the agreement was that the deposit was to be held in an interest bearing account. Mr. Nastat testified that he could not get interest on his account for the twenty-three days of March until the transaction closed and so he placed the funds in his business account which he said was #48-02039. He had not produced any statements involving this account to Mr. Prendergast and failed to submit them to this Tribunal. In order to ensure that he had this opportunity, the Tribunal adjourned the hearing for some days permitting him in the meantime to secure them. He has failed to produce them and the result is simply that we have no evidence before us to support his claim.

There is, however, further evidence which cannot be ignored. In his written argument, Mr. Nastat contends that he had placed the funds in his personal account #48-02039 and paid out of that account the purchaser's deposit in the sum of \$25,250. An examination of the cheque he refers to, however, reveals the cheque was drawn on the trust account #69-06218 and on the date which the cheque bears May 28, there were no funds in the trust account (Exhibit 25). The next day he sent by fax to Mr.

Prendergast a copy of the cheque with the undertaking:

3 - I will bring to your office within two days all the cheque stubs, the cancelled cheques and the bank statements.

Unfortunately, Mr. Nastat was either unwilling or unable to fulfil that promise.

The decisions of this Tribunal are based on the evidence presented to it and the law as it applies to that evidence. We are aware of the duty imposed upon the Tribunal in its examination of that evidence and the conclusions to be drawn from it. The governing standard of proof is set out in Re: Bernstein and College of Physicians and Surgeons of Ontario (1977) 15 O.R. 2d 447 in the pronouncement of O'Leary, J. at p.470:

In my view discipline committees whose powers are such that their decisions can destroy a man's or woman's professional life are entitled to more guidance from the Courts than the simple expression that "they are entitled to act on the balance of probabilities".

.....
The important thing to remember is that in civil cases there is no precise formula as to the standard of proof required to establish a fact.

In all cases, before reaching a conclusion of fact, the tribunal must be reasonably satisfied that the fact occurred, and whether the tribunal is so satisfied will depend on the totality of the circumstances including the nature and consequences of the fact or facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding.

Quoting this decision, Reid, J. in Re Coates et al and Registrar of Motor Vehicle Dealers and Salesmen (1989) 65 O.R. 2d, 526 continues at p.536:

This message is clear and has been consistently adopted by this court. Nothing short of clear and convincing proof based upon cogent evidence will justify an administrative

tribunal in revoking a licence to practice medicine or to gain a livelihood in business.

The concept that the standard of proof rises with the gravity of the allegation and the seriousness of the consequences has been reaffirmed in the recent decision of the Supreme Court of Canada in R. v. Oakes, [1986] 26 D.L.R. 4th 200.

Again in Smith v. Smith [1952] 3 D.L.R. 449, Cartwright, J. at p.463 states:

I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences.

In this matter, the Tribunal gave Mr. Nastat every opportunity to refute the allegations of the Registrar. Ms. Christophe, counsel for the Registrar, at page 12 of her argument observes:

Nastat's subsequent failure to submit certain banking statements in regards to his Personal Account - despite being given unprecedented leeway by the Tribunal to do so...

Due to the seriousness of the allegations and the gravity of the consequences, Mr. Nastat was given ample time by the Tribunal to produce certain bank statements to corroborate his evidence. He did not, however, do so. The Tribunal therefore is left with the inescapable conclusion that the funds in question were diverted to his personal use. On the basis of the evidence before it, no other finding is possible. We, therefore, find as a fact Mr. Nastat and through him his company operated in breach of section 19(2) and section 20(1) of the Real Estate and Business Brokers Act.

In Re Coates et al and Registrar of Motor Vehicle Dealers and Salesmen (supra) at p.534, Reid J. observes:

In revoking a registration, the Tribunal is interfering with a right to make a living that has been equated to a property right.

.....

While the grant or refusal of a licence may be regulated as a matter of privilege, rather than right, the revocation of an existing licence has always been regarded as an interference with a right, not a privilege.

Mr. Nastat and his company have been registered as real estate brokers for less than 12 months. The Registrar, Gordon Randall in his evidence, stressed the fact the breaches of the Act have occurred within that short period. Asked if he still supported the allegations made in his Proposal, he said all of the evidence that had come before him unquestionably confirmed his decision.

During these proceedings, the Tribunal has had the opportunity of weighing this evidence against that submitted by the appellants. The obvious misuse of the trust funds, together with the failure of Mr. Nastat to disclose his previous convictions on his applications unequivocally militate against our finding the Registrar wrong. The Registrar is, therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act directed to carry out his Proposal.

LAWRENCE NICOLAK

APEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
A.D. MANCHESTER, Member

APPEARANCES:

LAWRENCE NICOLAK, appearing on his own behalf

ALVIN TORBIN, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF
HEARING: 3 September 1991

Toronto

REASONS FOR DECISION AND ORDER

The Registrar's Proposal issued January 8, 1991, was based on the non-disclosure of the Applicant to question 6 of current pending charges at the date of his application for registration.

The Registrar in his opinion also indicated that he was concerned particularly as one of the charges outstanding related to the Applicant's prior conviction for ability impaired.

The facts of this case are relatively clear. The parties agreed that in answer to question #6 of the application, the Applicant had responded yes and attached a statement stating, "I was found guilty on an impaired charge in 1982". The Registrar's office caused a criminal record search to be conducted, which search revealed that Nicolak had current charges pending against him of "assault to resist" and "causing disturbance" - the alleged offence date being January 24, 1990.

The Registrar's office sent an inquiry letter to Mr. Nicolak on July 6, 1990, seeking verification of the information obtained from its inquiry arising out of his June 3 application for registration.

Mr. Nicolak responded to the Registrar's office by letter dated July 16, 1990 in which he stated:

As I misread question #6, I would like to state that there is one pending charge.

- Cause disturbance by being drunk
- Assault to resist arrest

On January 24, 1990 at approximately 9:45 p.m. I was at the Pickering Town Centre, Pickering, Ontario when I was arbitrarily and unlawfully assaulted, arrested and detained by the Durham Regional Police.

A civil case is now in action against the Durham Regional Police.

To the best of my knowledge there are no other charges. If there is any additional information you require, please feel free to contact myself or my solicitor.

(emphasis added)

The letter went on to give the name of his solicitor, the solicitor's address and telephone number.

From July 16 to November 22, 1990, no further communication passed between the Registrar's office and Mr. Nicolak, on which latter date the Registrar's office indicated that the Registrar was planning to propose to refuse Nicolak's application because of failure to disclose. Contained in that letter was the following: "Is there anything further that you would like to provide or offer on your behalf." That letter was copied to the Applicant's solicitor and to his prospective employer. The solicitor responded to that letter indicating that the Applicant would appeal the Registrar's Proposal. It should be noted that the letter of November 22 did not, in fact, constitute a formal Proposal by the Registrar.

Subsequently, a letter of December 31, 1990, was sent to the Applicant which again invited the Applicant to respond with information concerning the charges and the case against the Applicant. The letter gave a deadline for responding of January 18, 1990. It should be noted that the letter being dated December 31, 1990, the deadline date must have meant January 18, 1991. Notwithstanding such deadline, the Registrar issued his Proposal on January 8, 1991.

The Tribunal concurs with the Registrar's view that intentional non-disclosure to questions in the application are a very serious matter of concern and in many circumstances would, in

the absence of a reasonable explanation, be a basis for refusing registration. There are, however, a number of factors which in each case must be considered before proceeding to deny registration.

In this particular case, there are two items referred to in the Applicant's letter of July 16 which should have been investigated further. It should also be noted that the letter of July 6, 1990 from the Registrar's office. The two items to which reference was made in the letter of July 16, 1990 are that the Applicant misread question #6 and that a civil case was in process against the Durham Regional police. The letter also invited the Registrar's office to contact the Applicant's solicitor or the Applicant for further information if required. If the letter of July 16, 1990, had been a part of the Applicant's application of June 3, 1990, there is no doubt that it would have constituted full disclosure in answer to question #6.

In his evidence before the Tribunal, the Applicant appeared to be honest in presenting his testimony. He stated that the question #6 seemed to be dealing principally with convictions and that he thought he had missed the reference to charges pending. He also stated that if he had read question 6 properly, he would have answered it properly.

The Tribunal has noted that question 6 appears to be a two-pronged question: one dealing with convictions and the second dealing with charges pending. It would appear to the Tribunal that the application form should really clearly separate these two questions. It is possible, therefore, that the Applicant answering the questions without assistance may, in fact, have overlooked the second portion of question 6. It is also possible that the Applicant genuinely felt that there was no basis in fact for the charges having been laid and, as indicated in his letter of July 16, 1990, was bringing action against the Durham Regional Police and invited the Registrar to contact his solicitor for details. In fact, on February 11, 1991, the charges against the Applicant were withdrawn. While there is some reference in the charge sheet that these charges were withdrawn because of the Askov decision, the Tribunal is not prepared to find that the charges would have succeeded had they been proceeded with.

In the view of the Tribunal, information relating to the charges and to the civil action against the Durham Regional Police could have been obtained by the Registrar's office by contacting the solicitor of the Applicant. It is entirely possible that the Registrar in such an inquiry might have come to the conclusion that the Applicant did not intentionally fail to disclose and might have

dealt with the Applicant's registration application in a somewhat different manner.

In his evidence before the Tribunal, the Registrar indicated that had the information been disclosed to him in the application of June 3 and after appropriate investigation, the Registrar might very well have granted the application or imposed some terms upon the Applicant Nicolak.

The Tribunal also notes that in the letters from the Registrar's office of July 6, November 22 and December 31, 1990, there is contained implications that the Applicant's application was continuing under examination and held out a hope to the Applicant that the matter would be resolved in a manner which would permit the Applicant to be registered.

In particular, the Tribunal is of the view that there is an element of unfairness to the Applicant contained in the procedures dealing with the Registrar's letter of December 31, 1990, in that the Proposal to refuse registration was then issued January 8, 1991 in advance of the deadline of January 18, 1991. Particularly, this becomes significant when it is noted that the charges were, in fact, withdrawn on February 11, 1991 less than a month later. An interesting anomaly therefore exists at the date of this hearing, that if the Applicant were to file a current application with the Registrar, it would be in all likelihood identical to that application which he filed on June 3, 1990, making no reference to any current charges.

This, therefore, reduces the Registrar's Proposal simply to the fact of non-disclosure of these pending charges in the June 3, 1990 application. Does this mean that the facts as now presented to the Tribunal are sufficiently changed to justify a new application under Section 10 of the Act? Because the Registrar is basing his Proposal simply on the fact of non-disclosure, it is the view of this Tribunal that a new application could be met with the same objection in that the Applicant had filed an application in which he had made non-disclosure (the June 30, 1990 application).

In all of the cases cited by counsel for the Registrar, very serious public issues were involved. This would appear not to be the situation in the case of the current Applicant. In the view of this Tribunal in this particular case and the facts as disclosed to the Tribunal, including the circumstances which gave rise to the charges in January of 1990, the Registrar on fuller investigation would perhaps have given the Applicant the benefit of a doubt concerning the non-disclosure of those charges pending.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar not to carry out his Proposal and, in fact, to register the Applicant under the Real Estate and Business Brokers Act.

DEBORAH S. QUIRK

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
MARY G. CRITELLI, Vice-Chairman as Member
A.D. MANCHESTER, Member

APPEARANCES:

KENNETH SMITH, representing the Applicant

ALVIN TORBIN, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF
HEARING: 27 September 1991

Toronto

REASONS FOR DECISION AND ORDER

Deborah Quirk was registered as a real estate salesman under the Real Estate and Business Brokers Act on July 16, 1986 until November 15, 1988 during which time she was associated with Tower Realty Ltd. On November 16, she transferred her registration to ReMax Homecentre and on March 15, 1989, her registration was terminated. This is apparent from the Director's Certificate which was introduced in evidence.

She applied for a renewal of her licence under application dated the 12th day of July, 1988 which was received by the Department on August 25, 1988. In answer to question 6 on the application which says:

Have you ever been convicted or found guilty of an offence under any law or are there any charges now pending? If yes, attach full particulars on a separate signed and dated statement.

the Applicant responded "No".

It appears, however, that an investigation by the Registrar established that the Applicant had been charged on May 16, 1988 with fraud and forgery under the Criminal Code of Canada.

Mr. Fred Cam, an investigator with the Ministry, noted

that the application was signed on July 12, 1988 whereas on obtaining two copies of the information, he learned that she had been arrested on May 16, 1988 on the two charges of fraud and forgery. He then contacted Frank Tossene, the broker who employed her and who identified her signature. It appears that he also contacted Ms. Quirk and she apparently said that under legal advice, she was advised not to discuss the matter with him. He told her that her licence was revoked since she had not appealed the Proposal of the Registrar to revoke her licence because of the false statement in the application, and she asked him if her lawyer one Bloomenfeld had not appealed it. Contrary, perhaps to her instructions, however, Mr. Bloomenfeld had not filed the appeal which would have come before this Tribunal at an earlier date.

As a result of his investigation, Mr. Cam laid a charge under Section 50(3) of the Real Estate and Business Brokers Act and on February 7, 1990 after a trial and a finding of guilt, the Court levied a \$1,000 fine with three months to pay. Ms. Quirk, however, appealed this decision and a new trial was ordered for October. Since it was not heard at that time, but put over until May of 1991 on a motion under Section 11(b) of the Charter, the charge was dismissed pursuant to the Askov case.

On cross-examination by Mr. Smith representing Ms. Quirk, it was admitted by Mr. Cam that the charges laid by the police in relation to the property of Ms. Quirk's grandfather were dismissed or withdrawn.

Mr. Frank Tossene testified that he had employed Ms. Quirk from July 3, 1986 to November 15, 1988 and the renewal application on being received by her was completed and then went to the secretary to see that all questions were answered, but no attempt was made to verify the truth of the answers. He then signed the verification statement and the application which subsequently went to the Department. He said that he expected that question 6 would have been answered "Yes" and it would have been had he known of the proceedings, but nevertheless would have continued to sponsor her because there were never any complaints as far as her work was concerned.

It appears that the fraud and forgery charges arose out of a transaction which Ms. Quirk had with her grandfather apparently not entirely with his consent in which he signed or was alleged to have signed a deed over to her. The deed was in fact, however, forged and signed by Ms. Quirk. The grandfather, one Yaroslaw Wornach, when the charges came up in Court, did not appear. As a result, the charges were either withdrawn or dismissed by the Court.

Mr. Isadore Rotterman, appearing on behalf of Ms. Quirk, pointed out that he had known her since childhood and that he had no occasion ever to question her honesty or her integrity. He said that she would be reliable in all circumstances and that he would trust her with his office affairs at any time. He noted that Mr. Wornach, the grandfather concerned, was an irrational man and violent towards the family.

The Registrar, Mr. Randall in his evidence pointed out that the Proposal he had issued on February 14, 1989 refusing to renew the registration on the grounds of the failure to disclose the criminal proceedings was not appealed and as a result, the Notice of Termination was final. It was his opinion that the Applicant could not be relied on for honesty and integrity and although in the second application of February 23, 1990 for a new licence, Ms. Quirk had answered "Yes" to question 6 with letters attached, she failed to disclose other charges which were pending in November. These, however, had not been laid at the time and subsequently in a further application of September 1990, she answered again "Yes" to question 6 attaching a letter from her solicitor advising the Registrar of all the criminal charges and the disposition of them. Mr. Randall pointed out that he places no weight on the charges since there are no convictions, but that the non-disclosure was the troubling issue.

Mr. Stuart Rosenthal, a lawyer practising in Toronto, acted as counsel for Ms. Quirk during the appeal of the charge of a false statement under the Act. He pointed out that she had been offered an absolute discharge apparently by the Crown, but she refused this and that she was not represented originally during the trial on the false statement. He said that she now goes to extreme lengths to answer questions correctly.

Ms. Quirk is 30 years of age, has lived in Toronto for the past 12 years and has a grade 12 education. She attended Seneca College for a period of a year and a half taking a course in marketing and has had several jobs in the interim period prior to entering the real estate field. She points out that she would like to get into commercial investment which she found more interesting and with Mr. Laduca, a broker at York Mills understands her problem and is fully prepared to support her now.

She said that on the application question 6 was answered "No" but she had made a mistake and was not attempting to mislead the Registrar saying, "I simply did not understand the question properly". She said I did not do it on purpose and I was not trying to conceal information from the Registrar. She felt that question 6 is to some extent misleading. She pointed out further that she had asserted her innocence throughout the criminal

proceedings and that as a result, in none of the charges was there a conviction. She further said that she was not guilty and always wondered why she was charged. She said "I wanted to clear my name, I feel I have been discredited and I am now certainly on speaking terms with my grandfather." She further pointed out that her mental state at the time was somewhat distraught. She was not thinking clearly and that she had never been involved with the law on any previous occasion. She said "I am my grandfather's favourite child and he would never charge me". She thus demonstrated her contrition and was clearly sorry for the past performance.

As a result of her evidence, the Tribunal is of the view that it would be not material or relevant to deal with the nature of the charges which were preferred against Ms. Quirk since they were, in fact, all disposed of with either her acquittal or being withdrawn. As a result, we look upon this application from the point of view of the Registrar and that is, essentially, was question 6 deliberately answered in the negative in order to obtain her renewal of her registration?

Mr. Torbin, on behalf of the Registrar, points out the Registrar's concern primarily that the application is a test of her honesty and integrity. He said that she is not a first timer, as he points out, because she had previously submitted an application and had taken segment one of the course which deals with applications.

He further argues that when she submitted her application of July 12, 1988, it was just a month after she had been in Court for an adjournment on the charges and there is no reason why this question had not been answered honestly. Mr. Torbin further contends that Ms. Quirk according to her own testimony wishes to enter the field of commercial real estate which requires really more care than the usual residential type of real estate and as a result requires a higher degree of trust and integrity.

Mr. Smith, counsel for Ms. Quirk, points out that the Registrar at the time the Proposal was issued had only the benefit of the evidence which he saw on the application, and that was that the box beside question 6 was answered "No". He contends that the weight to be considered by this Tribunal should be upon her evidence and that question 6 is to some degree confusing and that she admitted that during this period, she was somewhat irrational and confused. He further points out that she has done so much to have her name cleared and she has as a result suffered no convictions. He reiterated her evidence where she refused to accept any deal with the Crown which also included an absolute discharge.

Numerous authorities have been tendered by Mr. Torbin, each of them indicating the importance of the application being absolutely truthful, particularly where question 6 is concerned with regard to previous convictions or proceedings pending against the registrant. We are in agreement with Mr. Torbin that the Registrar must be concerned in each of these applications and note Mr. Randall's determination to protect the public interest. There are, however, some factors in this matter which mitigate against our upholding the Registrar and refusing this registrant a licence to continue her chosen trade. Her honesty in her testimony is impressive and it is quite conceivable that she carelessly or inadvertently answered the question as a result of which the truth did not appear on the application. We are, therefore, of the view that the Registrar should refrain from carrying out his Proposal but that because Ms. Quirk has been out of business for the past three years and only been in the real estate business for three years prior to that, she should be permitted registration subject to her passing the three pre-licensing courses, more specifically phase 1, 2 and 3 of the Ontario Real Estate Association qualifications and once licensed, she must complete the three mandatory post licensing courses within the two years of her being granted a licence.

SHIPRA RANA

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION and
TO REFUSE TO GRANT RENEWAL OF REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
A. DONALD MANCHESTER, Member

APPEARANCES:
ALISTAIR RISWICK, representing Shipra Rana

GAIL MIDANIK, representing the Registrar of
Real Estate and Business Brokers

DATE OF
HEARING: 6, 12 June; 30 August 1990. Toronto

REASONS FOR DECISION AND ORDER

The appellant Shipra Rana was employed as a sales agent for the real estate brokerage firm of Re/Max West Realty from June 1, 1985 to August 3, 1986. On August 25, 1986, she changed her employment to Miracle Realty Ltd. and later to Re/Max Premier Realty Inc. until January 24, 1990, when her registration was terminated for failure to file an application for renewal. In the meantime, the Registrar had directed to her a Notice of Proposal to refuse to renew her registration on the grounds that "her past conduct affords reasonable grounds for belief that she would not carry on business in accordance with law, and with integrity and honesty." Mrs. Rana now appeals from that decision.

It is to be noted that the allegations upon which the Registrar relies refer to events which occurred during the appellant's employment with Re/Max West Realty where her husband Shan Rana also worked as a real estate salesman. The parties later separated, but at all material times for the purposes of this decision were living together as husband and wife.

The transactions in which Mrs. Rana and her husband Sudarshan Rana commonly known as Shan Rana were engaged and which form the subject of this appeal involved two properties on John Garland Blvd. in Etobicoke, Ontario. The facts are not in dispute and may be related simply as they are stated in the Proposal of the Registrar.

On October 9, 1985, a Mr. and Mrs. Nelson Lohnes listed their property at 242 John Garland Blvd., Unit 20, for sale with Re/Max West Realty Inc. through the agency of Sudarshan Rana and on November 8, 1985, he approached Mr. Lohnes with an Offer to Purchase purportedly signed by one Roshan Arora. This Offer was accepted by Lohnes and the date scheduled for closing was July 7, 1987.

Before the closing date, however, Rana approached Lohnes advising him that he would waive his commission to assist the purchaser if Lohnes would agree to this arrangement and reduced the purchase price accordingly. This was agreed between the parties and Rana, therefore, deleted any commission from the Agreement. The transaction closed on the 18th of July 1986, but the purchaser appeared not to be Roshan Arora but Mrs. Shipra Rana, the wife of Sudarshan Rana, in whose name the deed was registered. It does not appear that Mrs. Rana made any disclosure to Mr. and Mrs. Lohnes that she was the purchaser of their property or of the fact that she was a registered real estate salesperson.

The Agreement originally had called for a purchase price of \$51,000 and the deed executed by Mr. and Mrs. Lohnes in favour of Roshan Arora had been prepared to reflect that amount. That deed as registered had been altered in favour of Shipra Rana and indicated the purchase price was \$70,000. Mrs. Rana also had apparently applied for a mortgage and a mortgage appears on the Registry office records as being secured against the property in favour of Beneficial Finance in the sum of \$56,800 which, of course, was considerably more than the amount paid for the property.

The other transaction arises out of a listing agreement dated December 5, 1985, in which Sudarshan Rana obtained that listing from Pablito Agustin to sell his property at 246 John Garland Blvd., Unit 44, the listing price being \$58,000.

On December 11, 1985, six days after the property was listed with her husband, Shipra Rana presented an Offer apparently executed by Roshan Arora to Pablito Agustin for \$52,000 and Agustin agreed to accept the Offer provided that his commission was reduced from \$3,150 to a flat fee of \$800. Subsequently, on January 2, 1986, Sudarshan Rana obtained an Offer to Purchase executed by one Robert Kane on behalf of his daughter and son-in-law , a Mr. and Mrs. Roy Whidden. This Offer called for the purchase price of \$60,000 and the vendor in this Offer was Roshan Arora.

The transaction closed on March 27, 1986 and the title was transferred directly from Pablito Agustin to Margaret and Roy

Whidden. The deed reflects a sale price of \$52,500 which was struck out and altered to \$60,000.

This transaction was not disclosed to Mr. Rana's employing broker, nor was full disclosure made by Mrs. Shipra Rana of her interest in the matter to the vendor Pablito Agustin.

The Registrar, Gordon Randall, in his evidence pointed out that in both transactions the properties were listed with Re/Max brokerage, but that in the Lohnes offer the name of the broker had been deleted. He said that when a deal closes, it definitely goes through the broker and commission is payable accordingly by the vendor. The Offer was between Lohnes and Roshan Arora (father of Shipra Rana) but when it closed and the deed was registered, it had been changed to Shipra Rana. The Land Transfer Tax affidavit reflected \$70,000 whereas the Offer bore the sale price of \$51,000. As a result, Lohnes may have suffered a loss of some \$20,000 and could have been liable to Re/Max for commissions under the Listing Agreement despite the fact that Shan Rana had agreed with Lohnes to forgive the commission.

Mr. Randall observed that what you have here is a classic flip situation with Mrs. Rana in the middle. In order to finance the property, she placed a mortgage on it in the sum of \$56,800, \$5,800 more than what she paid for it.

In the transaction involving 246 John Garland Blvd., Unit 44, Pablito Agustin, through the agent Shipra Rana, entered into an offer to sell his property to Roshan Arora. On December 11, 1985, the price was \$52,500 and the closing date March 28, 1986, but in another offer on the same property Roshan Arora sells to Robert C. Kane on January 2, 1986 for \$60,000 with the same closing date. Agustin's commission had been reduced to \$800 and either Shipra Rana or her father gained \$7,500 on the deal.

Called by her counsel, Mrs. Rana in her evidence said she had been married to Shan Rana in 1972, but had separated from him in 1989. He apparently pays no support for her and the three children.

Her youngest sister was killed in the Air India crash and after settlement with the airlines, she attempted to persuade her father to come to Canada from India and buy property near her. He had signed a Power of Attorney for her to act on his behalf and she had signed the Agustin agreement with the expectation that her father would occupy the property. He eventually decided not to come to Canada, but she thought it would be a good idea to buy property for him in the event of his changing his mind. As far as the \$7,500 profit was concerned, she said it went to her father.

An affidavit produced in evidence and sworn by her father, however, does not indicate that he received that profit.

Mrs. Rana referring to the Lohnes transaction said she had nothing to do with it and became the owner only because her father would not come to Canada.

Carol Spencer, a real estate agent for three years, has known Mrs. Rana for the past two years and says she has been a good person to deal with and particularly good with clients. She pointed out that these transactions were, in her opinion, out of character.

Mrs. Chris Morgan, a broker at Century 21 Marquis for five and one-half years, was willing to give Mrs. Rana a chance to earn a living in the real estate business. She says she understands Mrs. Rana's problems arose from her husband's dictation and not her own decisions. She did, however, add that if one of her salesmen put through a transaction which was listed with the company and did not disclose it to the broker then she would let him go.

The difficulty with this case is that both the husband and wife were employed with the same broker and engaged in questionable transactions as listing and selling agents. To what extent, he influenced her is not at all clear. After they left Re/Max West Realty, however, they both appear as agents at Miracle Realty Ltd - she on August 25, 1986 and he on August 19, 1986. This was after the two transactions had been completed and they had left Re/Max West Realty.

A lengthy and detailed appraisal of the Lohnes property (Exhibit 17) by Mashke, McGregor Appraisal Corporation on December 22, 1988 reflects the property at 242 John Garland Blvd., Unit 20, on November 8, 1985 to be appraised at the sum of \$55,000; this is the property which is registered in Mrs. Rana's name. On July 18, 1986, it is appraised at \$72,000 and on December 19, 1988, \$138,000. It is clear Mrs. Rana, fully aware of the real estate market, stood to gain a substantial profit on that transaction. Whether or not it was under the influence of her husband is not, in our view, material. Further, we are of the view that for the purposes of these transactions, Mrs. Rana and her father were one and the same person even though appearing as separate entities.

What then is her offence? Mr. Randall points to Section 31(1) and (2) of the Real Estate and Business Brokers Act which provides:

(1) No broker or salesman shall purchase, lease, exchange or otherwise acquire for himself or make an offer to purchase, lease, exchange or otherwise acquire for himself either directly or indirectly, any interest in real estate for the purpose of resale unless he first delivers to the vendor a written statement that he is a broker or salesman, as the case may be, and the vendor has acknowledged in writing that he has received the statement.

(2) Where real estate in respect of which a broker or salesman is required to give a statement under subsection (1) is listed with the broker or, in the case of a salesman, is listed with the broker by whom the salesman is employed, appointed or authorized to trade in real estate, the statement shall include,

- (a) full disclosure of all facts within his special knowledge that affect or will affect the resale value of the real estate; and
- (b) the particulars of any negotiation or agreement by or on behalf of the broker or salesman for the sale, exchange, lease or other disposition of any interest in the real estate to any other person.

Although Shipra Rana was the ultimate purchaser of the Lohnes property, we cannot find any evidence that it was for the purpose of resale. The Act in Section 31(1) specifically refers to "any interest in real estate for the purpose of resale". If Section 31(1) does not apply to that transaction, then clearly subsection (2) also has no application and she has not offended that section.

In the Agustin purchase, however, we have a different situation. There are two offers, one between Agustin and Arora and one between Arora and Kane resulting in a generous profit to Arora or Mrs. Rana. We are of the view that this purchase and sale falls squarely within the section and no disclosure was made to the vendor as required by Section 31 of the Act. There was further no record of the Kane and Arora transaction in the broker's office.

Whether or not influenced by her husband, it is clear Mrs. Rana knew she was treading on forbidden ground in becoming involved in these transactions. They cannot be rationalized or excused by the production of a power of attorney or some evidence of her acting ostensibly on behalf of her father. She is an experienced agent, having been in the trade since 1982, and is expected to know the Act and the Regulations under which she operates.

If we are to countenance or condone this conduct among agents as the accepted norm, then we can simply dispense with both the Registrar and the Act. Regulations become meaningless and the real estate market becomes a jungle where greed, avarice, connivance, deception and duplicity flourish, and in which the most primitive appetites prevail.

In conclusion, we are troubled by the complete lack of remorse exhibited by the appellant and her apparent failure to understand or appreciate that her conduct in these transactions contravenes the most fundamental provisions of the Act - those dealing with honesty and integrity.

On all the evidence, therefore, the Registrar's opinion is hereby upheld and by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

SUDARSHAN (SHAN) RANA

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
JOHN W. HARVEY, Member

APPEARANCES:

SUDARSHAN (SHAN) RANA, appearing on his own behalf
GAIL MIDANIK, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF 17 February; 15, 16, 17 July;
HEARING: 3, 4, 5, 6 December 1991

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal resulting from a Proposal of the Registrar of Real Estate and Business Brokers to refuse to register the Applicant as a salesperson. The application upon which the Proposal was issued was submitted by the Applicant on July 30, 1990 and the Proposal to refuse registration was issued by the Registrar on October 30, 1990. A copy of this application was filed as Exhibit 23 herein and of the Proposal as Exhibit 15. Following some adjournments, the matter came on for hearing on July 15, 1991 at which time the Tribunal was advised that the broker which had sponsored the Applicant's application had withdrawn and counsel for the Registrar asked for an Order dismissing the Applicant's appeal from the Proposal on the ground that the Tribunal had no jurisdiction since there was no sponsoring broker.

The Applicant advised that he had a new sponsoring broker who could attend and confirm his sponsorship the following day. The Tribunal adjourned the commencement of the hearing on its merits until the next day, July 16, 1991 stating that, by reason of the difficulties which the Applicant had experienced with more than one sponsoring broker upon this application, it wished to have the confirmation before disallowing the motion brought by counsel for the Registrar.

On July 16, the new sponsoring broker attended and confirmed his sponsorship which was contained in another

application for a licence dated July 14, 1991 and in a letter to the Registrar of the same date, copies of which were filed as Exhibit 18 herein. If the Tribunal were to conclude that it should direct the Registrar to register the Applicant, it would be upon this application.

The Applicant had been registered as a real estate salesperson previously and has a considerable history of difficulties with the Registrar. Exhibit 19 is a Director's Certificate showing the history of his registration:

Montreal Trust Company of Canada	September 20, 1982 to December 24, 1982
Re/Max West Realty Inc.	December 24, 1982 to March 1, 1985
Westway Realty Ltd.	March 1, 1985 to May 31, 1985
Re/Max West Realty Inc.	June 1, 1985 to August 13, 1986
Miracle Realty Ltd.	August 19, 1986 to April 16, 1987
Miracle Realty Ltd.	October 5, 1987 to June 8, 1988
Homelife Miracle Realty Ltd.	June 9, 1988 to April 3, 1989
Belstar Realty Limited	April 4, 1989 to October 5, 1989

Exhibit 17 is a Proposal dated February 3, 1988 by the Registrar to revoke the then existing registration of the Applicant and of his wife Shipra Rana who was also registered as a real estate salesperson and was employed during certain relevant times by the same real estate broker. Exhibit 16 is a Notice of Further Particulars dated December 13, 1989, giving such particulars further to the Notice of February 3, 1988 and referring as well to another Notice of Further and Other Particulars dated March 10, 1988. Exhibit 15 is the Notice of Proposal aforementioned dated October 16, 1990 upon which the Applicant served notice requiring this hearing. Exhibit 14 is a Notice of Further and Other Particulars dated July 15, 1991 giving such particulars further to the Notice of October 16, 1990.

In every one of these Notices, the grounds for proposing to revoke the registration or to refuse registration was stated to be that, in the Registrar's opinion, Mr. Rana was not entitled to registration under Section 6 of the Real Estate and Business Brokers Act as his past conduct offered reasonable grounds for belief that he would not carry on business in accordance with the law and with honesty and integrity. In the Notices of Proposal and of Further Particulars with which we are dealing in this hearing, notice was also given under Section 8 of the Statutory Powers Procedure Act that the good character, propriety of conduct and competence of the Applicant should be in issue and reference is made to allegations contained in the Notices with respect thereto. These Notices also contain details at length as to the conduct of the Applicant in connection with specified transactions which were the subject matter of evidence, both written and oral at the hearing and with which we shall deal in that context.

Before dealing with the evidence and our findings upon it and our conclusions on the issues at this hearing, the Tribunal wishes to give some reasons for a ruling which it gave during the course of the hearing upon a motion brought before it by counsel on behalf of a witness who had been served with a summons to witness by the Applicant to attend and give evidence at this hearing. This motion was to quash the summons and relieve the witness of the requirement to respond to the same.

The facts relevant to this motion were the following:

Exhibit 31 herein is a copy of a decision of the Ethics Committee of the Toronto Real Estate Board dated December 8, 1988 being a Committee composed of a chairman and six other members which heard a complaint against the Applicant and his then employing broker Homelife Miracle Realty Ltd. for an alleged violation of articles 5 and 25 of the Standards of Business Practice and of Section 28 of the Real Estate and Business Brokers Act. The decision of the committee was:

It was the Decision of the Ethics Committee that: MR. SHAN RANA OF HOMELIFE/MIRACLE REALTY LTD. BE FOUND IN VIOLATION OF ARTICLE 5 AND 25 OF THE STANDARDS OF BUSINESS PRACTICE AND SECTION 28 OF THE REAL ESTATE AND BUSINESS BROKER'S ACT; AND BE FINED \$1,000.00.

The Applicant brought an appeal from that decision to the Appeal Committee of the Toronto Real Estate Board, pursuant to the

practice of the Board established for this purpose, and the decision on this appeal was given on September 26, 1989 by the Appeal Committee consisting of Mr. William G. Beckwith, Chairman and six other members. Exhibit 32 is a copy of its decision which was:

It was the decision of the Appeal Committee that: THE DECISION OF THE ETHICS COMMITTEE OF DECEMBER 8, 1988 FINDING MR. SHAN RANA IN VIOLATION OF ARTICLE 5 AND 25 OF THE STANDARDS OF BUSINESS PRACTICE AND SECTION 28 OF THE REAL ESTATE AND BUSINESS BROKERS ACT BE UPHELD IN PART;

- AND - THAT THE FINE OF \$1,000. IMPOSED UPON MR. RANA BY THE ETHICS COMMITTEE OF DECEMBER 8, 1988 BE INCREASED TO \$3,000 AND THAT MR. RANA BE PLACED UPON PROBATION FOR A PERIOD OF TWO (2) years.

THAT THE FILING FEE OF \$300 BE RETAINED BY THE BOARD

As part of the Registrar's case at this hearing, his counsel filed copies of these decisions as indicated. The Applicant obtained from the Tribunal a summons to witness and completed the same to summon William G. Beckwith as a witness on his behalf and to bring with him all documents "with respect to the Ethics Board decision." Exhibit 35 is a copy of this summons to witness.

Mr. J. Brian Casey appeared before the Tribunal as counsel for Mr. Beckwith and for the Toronto Real Estate Board and made a motion to quash the summons and to relieve Mr. Beckwith of the requirement to attend. At the conclusion of argument upon this motion, the Tribunal allowed the same and quashed the summons stating that written reasons for this decision would follow. We now give these reasons.

The summons was issued pursuant to the provisions of Section 12(1) of the Statutory Powers Procedure Act:

12(1) A tribunal may require any person, including a party, by summons
(a) to give evidence on oath or affirmation at a hearing; and
(b) to produce in evidence at a hearing documents and things specified by the

tribunal,
relevant to the subject-matter of the
proceedings and admissible at a hearing.

In order to come within this provision, the evidence being sought from the witness must be relevant to the subject-matter of the proceedings and admissible at the hearing. Other evidence before the Tribunal established clearly that the facts supporting the complaint upon which the Ethics Committee and the Appeal Committee of the Toronto Real Estate Board acted were simply that Mr. Rana had advertised a property which he himself owned for sale through his then employing broker Homelife/Miracle Realty Ltd. without complying with the rules and regulations of the Toronto Real Estate Board applicable to doing this. Both Mr. Rana as a real estate salesperson member and Mr. Harivaden Patel (the broker/principal in Homelife/Miracle Realty Ltd.) as a broker member were subjected to complaints which resulted in the Ethics Committee hearing and decision.

It was apparent that the only evidence which Mr. Rana could be seeking from Mr. Beckwith was evidence as to the deliberations of the Appeal Committee and of its reasoning in reaching its decision. Because the Tribunal already had all of the relevant facts as to the subject matter of the complaint and as to the decision of both Committees which facts were not in dispute, the narrow issue remaining to be determined on the motion was whether the evidence of Mr. Beckwith as to the deliberations of the Appeal Committee and as to the reasoning of its members was relevant and admissible at this hearing.

Mr. Casey referred the Tribunal to a case in which the English Court of King's Bench applied the governing legal principle to a Board established under a statute, namely the National Insurance (Industrial Injuries) Act of 1946. See Ward v. Shell-Mex and B.P., Ltd., a decision of Streatfeild, J. [1951] 2 All E.R. 904 following a trial on October 16 and 17, 1951.

The headnote reads:

"A workman suffered from eczema which, he alleged, was due to the negligence or breach of statutory duty of his employers in not providing him with adequate protective clothing in his work. He was examined by a medical board under the National Insurance (Industrial Injuries) Act, 1946, s. 39(1), which issued a certificate of its decision. In an action for damages against the employers the

workman proposed to call a doctor who had been a member of the board to give evidence of his condition at the time of the examination and of his conclusions as to the cause of that condition.

Held: while the doctor was a competent witness to give admissible evidence regarding the facts and matters presented before him relating to the workman's condition at the relevant date, he could not give evidence as to the reasons which prompted him to come to the conclusion which resulted in the board issuing the certificate."

per Streatfeild, J. at page 905.

"Counsel for the Minister of National Insurance, who has given me the benefit of his argument which has been received without objection, has submitted, and I think rightly, that the position of a member of a board under the Act is somewhere between that of an arbitrator and that of a judge. It is well settled that a judge cannot be called as a witness to justify, still less to vary or contradict, his judgment. The position of an arbitrator, whose position is, perhaps, less strong than that of a member of a medical board set up under the Act of 1946, is discussed with elaboration in *Duke of Buccleuch v. Metropolitan Board of Works* (1), where Cleasby, B. (L.R. 5 H.L. 432) laid down the principles which governed the position of an arbitrator who is required to give evidence concerning matters arising out of his award. His opinion was adopted with approval by Lord Cairns (*ibid.*, 462). Cleasby, B., answers the questions which were before the court in this way (*ibid.*, 432):

1. That the umpire was a competent witness, like any other person, to prove matters material to the issues.

So I think here the doctor would be a competent witness so far as any question of competency arises, but the question is: What evidence can he give which is relevant to the issue? The second question was answered by Cleasby, B., in this way (*ibid.*, 433):

2. That question might be properly put to him for the purpose of proving the proceedings before him, so as to arrive at what was the subject-matter of adjudication when the proceedings closed, and he was about to make his award.

But there is this important qualification (*ibid.*):

3. That as regards the effect of the award no questions could properly be put to the umpire for the purpose of proving how it was arrived at, or what items it included, or what was the meaning which he intended at the time to be given to it.

elaborating that, the learned baron proceeded (*ibid.*):

Being competent generally, it follows that he may be questioned as to what took place before him, so as to show over what subject-matter he was exercising jurisdiction. He might, therefore, prove that a claim was made for compensation in respect of one matter, A., and also in respect of another matter, B., and that both were entertained without objection; or he might prove claim B. was objected to and rejected, or that it was after objection received. He might, in short, give any evidence for the purpose of showing what was the subject-matter into which he was inquiring, and upon which his judgment therefore was to be founded. This would enable us to judge whether he was

acting within his jurisdiction or not, for a person exceeds his jurisdiction by prosecuting a judicial inquiry in a matter over which he has no jurisdiction, quite independent of the judgement eventually given. And it deserves notice, that as to this evidence, the umpire would be no better witness than any other person, and would not have it in his power afterwards, by his own evidence, to sustain or destroy the award... As soon as the award is made it must speak for itself. It must be applied, as in other cases, by extrinsic evidence to the subject-matter, but cannot be explained or varied or extended by extrinsic evidence of the intention of the person making it."

And he reached the conclusion that, at page 907:

" It seems to me, therefore, that this witness who is tendered is bound to be in this position at the hands of one counsel or the other. Either he would support his award in which case the award would speak for itself, or else he will contradict it in which case he could be cross-examined on the very line that Cleasby, B., said was inadmissible in the Duke of Buccleuch's case (1). That being the inevitable result of calling this witness, in my judgment, his evidence ought not to be received."

In considering the application of this law to the issue here, it must not be overlooked that neither the Ethics Committee nor the Appeal Committee of the Toronto Real Estate Board are statutory creations. However, the same reasoning which led Streatfeild, J. to reach the conclusion which he did with regard to the Medical Board applies equally to these Committees. The written decision of the Appeal Committee speaks for itself. The issue before us is not what were the facts and circumstances of the complaint upon which the decision was reached; these are not in dispute. What conclusion should be drawn from these facts and

circumstances as to whether they constitute past conduct on the part of the Applicant which afford some reasonable grounds for the Registrar's belief that he will not carry on business in accordance with the law and with integrity and honesty is a question for the opinion of this Tribunal and not for that of Mr. Beckwith or indeed any other witness who might be called. On this basis, the Tribunal concludes that the evidence being sought by from Mr. Beckwith did not come within the provisions of Section 12(1) of the Statutory Powers Procedure Act.

We come now to the issue which must be determined between the parties to this hearing - was the Registrar in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty?

Counsel for the Registrar has relied upon a number of incidents or transactions for facts and evidence in support of this conclusion. We shall refer first to the matter of certain dealings with a residential property at 11 Kennebec Crescent in Etobicoke. This was a house owned by Gino Bucci and Frances Bucci a husband and wife who had separated and who wished to sell the same. Mr. Rana was dealing with the listing from the owners with his broker Re/Max West Realty Ltd. and he showed the property at an open house which was attended by the ultimate purchasers and members of their families. These persons were also assisted in making the purchase by another broker, one Mr. Mackichan of Mackichan Real Estate Inc. There was a dispute between Mackichan and Rana as to the propriety of the role of the former in this matter and whether he was properly entitled to a share of the commission, but this is not an issue with which this Tribunal must deal.

In any event, Mr. Mackichan brought to Mr. Rana, an Offer from Karen Gaynor and Dorothy Gosse for \$98,000 on December 30, 1985, a copy of which is Exhibit 37. It was signed back to the purchasers at \$106,000 and was signed by the vendors at \$105,000, Mr. Bucci signing on January 2nd, 1986 and Mrs. Bucci on January 3rd. Mr. Rana signed as a witness to the signature of Mr. and Mrs. Bucci on the document and the Tribunal finds that on the 3rd day of January 1986, he had in his possession, a signed Offer from the Buccis to sell the property to these purchasers for \$105,000. Another amendment to this document, made and initialled during the course of these negotiations extended the time for the acceptance of the Offer to January 7, 1986. During the time that Mr. Rana had this Offer in his possession, he obtained from Mr. and Mrs. Bucci an Offer to sell the same property to him, Shan Rana for the same sum of \$105,000. This Offer was signed by all parties on January 6, 1986, and a copy is Exhibit 39 herein.

In the meantime, Mr. Mackichan had been attempting to find out what had happened to his client's offer for \$105,000, without success, and he was finally told sometime before January 18, 1986, that Mr. Rana had bought the property and, if his clients wanted it, he, Mr. Rana, would list it for sale through Mackichan Real Estate Inc. and sell it for \$107,700. An Offer to carry out this transaction was signed by Malcolm Gosse and Dorothy Gosse as purchasers on January 18, 1986 and accepted by Mr. Rana on January 21, 1986. A copy of this Offer is Exhibit 40. Exhibit 37 indicates that the Buccis paid a 6% commission to Re/Max Realty Inc. and both Exhibit 40 and the evidence of Mr. Mackichan indicates that his Company was to receive \$2,400 by way of commission from Mr. Rana, but he said he was never paid the full amount.

It is clear on this evidence that Mr. Rana acted in a flagrant breach of his duty to his own principals, Mr. and Mrs. Bucci and by deliberate and fraudulent misrepresentation of the facts they lost and he personally gained the difference between the selling prices.

We shall next discuss the evidence concerning two transactions involving properties on John Garland Boulevard, being Unit 20 at 242 John Garland Boulevard and Unit 44 at 246 John Garland Boulevard. On October 9, 1985, Mr. Rana obtained from its owners, Nelson and Lorraine Lohnes a Multiple Listing of Unit 20, 242 John Garland Boulevard at a price of \$56,000 until July 31, 1986 providing for a commission of 6% of the selling price to be paid to the broker/agent. A copy of this Listing Agreement is found at tab 9 of Exhibit 25.

On November 8, 1985, he presented to Mr. and Mrs. Lohnes, an Offer to Purchase stated to be from one Roshan Arora (In Trust) for \$54,000 and this Offer was accepted on that date. A copy of this document is found at tab 9 of Exhibit 25. A number of relevant and important facts were unknown to Mr. and Mrs. Lohnes at that time - Roshan Arora was the father of Shipra Rana, who was the wife of Shan Rana and who was also licensed as a real estate salesperson at that time and also employed as a salesperson at the same office of Re/Max West Realty Inc. Mr. Arora was resident in India and not in Canada; Mr. Arora had executed a Power of Attorney on September 3, 1985 at New Delhi giving his daughter, Shipra Rana, authority to transact business and sign documents on his behalf in Canada (see tab 13 of Exhibit 25); the Offer found at tab 9 of Exhibit 25 was signed with Mr. Arora's name by Shan Rana and not by his wife who had the Power of Attorney and Shan Rana had signed his name as a witness to the "signature" of Roshan Arora. None of these facts were disclosed to Mr. and Mrs. Lohnes by the Applicant.

It is also to be noted that while tab 10 of Exhibit 25 was prepared on a regular Toronto Real Estate Board condominium resale form with the name of Re/Max West Realty Inc. shown as vendor's agent, that name of the agent was heavily crossed out. It was the evidence of the broker/manager of the office of the broker that this Offer and this sale was not noted in the broker's records although the Listing Agreement was so noted, and further that the deposit stipulated was never put into the broker's trust account. He said that his Company would not have accepted the document with the name of the broker struck out.

This Offer contains some rather unusual provisions. It was originally fixed to close on January 31, 1986 and was moved ahead to July 7, 1986. It had originally provided that the purchaser would move the closing date forward if requested by the vendors to a date not later than July 30, 1986 and could continue to live on the premises on July 15, 1986 on certain terms and conditions. These unusual terms were said to be included because the vendors were having a new house built in Brampton and they did not know when it would be ready. We refer to these aspects of the Offer, not because they are particularly relevant to the issues to be determined as we see them, but because Mr. Rana made a good deal of them at the hearing as showing the lengths to which he went to serve his clients.

In any event, in June of 1986 Mr. Rana went to Mr. and Mrs. Lohnes with a proposal that they reduce the \$54,000 selling price to \$51,000 in return for an agreement with the broker that no commission would be paid. Mr. Lohnes said that they did not particularly like this proposal, but it improved their net position by \$240 so they went along with it. It was also at this time that Mr. Lohnes first noticed the broker's name struck out on the document. The transaction actually did close on July 18, 1986 as appears from a copy of the deed which is at tab 14 of Exhibit 25. This document also shows some other interesting things.

When the Deed was prepared with a typewriter (the evidence indicates that when it was signed by the vendors on July 17, 1986), it showed a selling price of \$51,000. Before it was registered, someone crossed out this figure and changed it with a pen to \$70,000 and Shipra Rana appended an affidavit for Land Transfer Tax purposes stating that the price was \$70,000. This affidavit was sworn on July 18, 1986. The purpose for this falsification becomes apparent when we look at tab 8 of Exhibit 25 being a copy of the Unit Register from the Abstract in the Registry or Land Titles office which shows the registration on the same day, July 18, 1986 of a mortgage or charge obtained by Shipra Rana against the property from Beneficial Realty Ltd. for \$56,800. No record of any part of this whole transaction was put on the records

of Re/Max West Realty Inc. except for the original Listing Agreement. Also, as appears, before this Deed (Exhibit 25, tab 14) was registered, someone had struck out the original name of the transferee which had been typed in and wrote in that of Shipra Rana so she was the purchaser who could raise money by way of mortgage on the property.

A similar pattern of deception and falsification is found in the dealing with Unit 44, 246 John Garland Boulevard. At tab 5 of Exhibit 25, we have a Multiple Listing Agreement from the owner Pablito Agustin dated December 5, 1985, listing it with Re/Max West Realty Inc. for \$58,900. The name of Shipra Rana is shown as the salesperson involved. Again on December 11, 1985, an Offer is produced to Mr. Agustin in the name of Roshan Arora for \$52,500. Mr. Agustin accepted the same on that date having amended the commission clause from 6% to a flat sum of \$800. This sale was originally set to close on February 28 and was later changed to March 28, 1986 as appears in the Offer found at tab 6 of Exhibit 25.

This transaction actually did close on March 27, 1986 when, as appears from a copy of the Abstract from the Registry office at tab 3 of Exhibit 25, a Deed was registered from Pablito Agustin to Margaret Catherine Whidden and Harold Roy Whidden as joint tenants. A copy of this Deed is found at tab 4 of Exhibit 25 and shows that, as originally prepared by typewriter, the purchase price was shown to be \$52,500, but before registration it had been changed to \$60,000 and it was upon this sum the Land Transfer Tax was paid. The Land Transfer Tax affidavit sworn by Harold Roy Whidden on March 26, 1986 stated that the purchase price was \$60,000.

It is interesting to note that the date shown on this Deed for the signing by Pablito Agustin was March 11, 1986 and of wife, as spouse, was March 12, 1986. There is a clear and unescapable inference upon all of this evidence that the number \$52,500 was on the document when the Agustins signed it and the number \$60,000 was on it when it was tendered to the purchasers and they paid, in fact, that price on closing.

There was more of deception and falsehood in connection with this transaction than appears from the foregoing. When Mr. and Mrs. Whidden were looking for a property of this type in this area, Mr. Shan Rana showed them Unit 20 at 242 John Garland Boulevard. At the time he did this, he had it listed as aforementioned. Mr. and Mrs. Whidden then entered into an agreement to purchase this unit for \$60,000. In December 1985, the Whiddens were told by Shan Rana that the vendors of Unit 20, 242 John Garland Boulevard could not move for sometime as their new

house was not ready and he got them to agree to cancel that Agreement of Purchase and Sale, and enter into a new Agreement to purchase Unit 44 at 246 John Garland Boulevard for the same sum of \$60,000.

On January 2, 1986, Robert C. Cain (the father of Mrs. Whidden who was assisting and acting on behalf of Mr. and Mrs. Whidden) entered into an Agreement of Purchase and Sale found at tab 7 of Exhibit 25. This was an agreement to purchase Unit 44 at 246 John Garland Boulevard from Roshan Arora for \$60,000. Mr. Shan Rana stated that he also signed Roshan Arora's name to this document and he was also the witness to that "signature". It is to be noted that no name of any agent is filled in and nothing is filled in by way of commission provisions.

All of this scheming was brought to its fruition as aforementioned when the transaction was closed in which Mr. and Mrs. Whidden paid \$60,000 of which Mr. Agustin received \$52,500 and someone else pocketed the difference.

In none of these three sets of transactions concerning properties on Kennebec Crescent or John Garland Boulevard did Mr. Rana disclose to his principals any of the facts as to his conflict of interest or secret profits. It is true that he did make certain disclosures, but these were only of facts which did not prompt inquiry as to anything he wished to keep hidden or of facts which they already knew, such as the fact that he was a registered real estate salesperson. In each of these transactions, the Tribunal finds that Mr. Rana deliberately misrepresented their material facts to third parties in circumstances where he knew that he would benefit personally if he could induce them, by his falsehoods to act to their detriment. The criticism which he deserves is the more severe because the persons whom he defrauded were persons to whom he owed, at the time, a fiduciary duty as an agent to a principal. Also in each of these transactions, Mr. Rana showed a complete lack of appreciation of his responsibility as an agent to his principals, as a professional in a regulated industry to the public and even as to the specific requirements of the Real Estate and Business Brokers Act and its Regulations.

The Tribunal assessed carefully the evidence of Mr. Rana and of the witnesses called on behalf of the Registrar and had no difficulty in reaching the conclusion that wherever the evidence differs or is in conflict, that of Mr. Rana should be rejected and that of these other witnesses accepted. In protesting that he was never aware he was doing anything wrong, Mr. Rana is just not believable. A person of his knowledge, intelligence and experience had to know that what he was doing was wrong and what was wrong with it.

We shall refer more briefly to the other incidents upon which counsel for the Registrar urged us to support the Registrar's conclusion. First we have Exhibit 29, the Sheriff's Certificate, which shows four executions registered against him for a total of over \$150,000 plus interest and costs; one being for over \$26,000 obtained by the Lohnes upon a judgement for damages for the fraud against them upon the transaction aforementioned. These facts, together with Mr. Rana's own evidence that because of certain losses of which he told us and his loss of his licence, he has no assets, appear to bring him squarely within the provisions of Section 6(1)(a) of the Real Estate and Business Brokers Act as being an applicant who cannot reasonably be expected to be financially responsible in the conduct of his business.

Next we have the fact that he was convicted of obtaining unemployment insurance benefits by illegal means. There was also his failure to disclose his conviction on an application for this licence made to the Registrar. The Tribunal cannot accept his explanation that he was not aware he was doing anything wrong. For reasons outlined above in a similar context, we have to conclude that he well knew that what he was doing was illegal. As to the failure to disclose, while it may seem of less consequence along with all of these other matters, it is not to be dismissed lightly. All of his actions show so much deliberate calculation as to what he perceives at any time to be in his interest, that we must conclude that his failure to disclose was not an oversight. On many occasions in its reasons for judgment, the Tribunal has stressed the importance of accuracy in answering the questions as to previous convictions. We refer to one of these. The case of Kadar and the Registrar of Real Estate and Business Brokers (1990) 20 CRAT 493, a decision of this Tribunal released on June 29, 1990 where at p.497 the Tribunal said:

...The disclosure matter is vital to the whole system, and the application form becomes a test of ethics which Kadar did not pass. Kadar has been registered before, he has twelve years business experience and is a linguist; so his excuse of not understanding is not acceptable.

Finally we have the two decisions of the Ethics Committee and the Appeal Committee of the Toronto Real Estate Board. We have already referred to these in some detail in dealing with the motion to quash the summons to witness. Here again we have a breach of the relevant established rules of the Real Estate Board which was viewed especially by the Appeal Committee to be of a serious nature. If this was done intentionally, we have another example

of a wrong course of conduct taken because of an expected benefit therefrom and if it was done unintentionally, we have an example of carelessness and lack of judgment in dealing with important documents and business.

There are two other matters to which we wish to refer. The first is the fact that this Tribunal in a judgement released on January 9, 1991 denied an appeal by Shipra Rana, the Applicant's wife from a Proposal of the Registrar to refuse to renew her registration as a real estate salesperson. The evidence relied upon in that case by the Registrar and upon which the Tribunal reached its conclusion that her past conduct afforded reasonable grounds for belief that she would not carry on business in accordance with law and with honesty and integrity was substantially the evidence of these two same sets of transactions dealing with the two properties on John Garland Boulevard. In finding against Mrs. Rana in that case, the Tribunal stated on page 6 of the report which we have:

If we are to countenance or condone this conduct among agents as the accepted norm, then we can simply dispense with both the Registrar and the Act. Regulations become meaningless and the real estate market becomes a jungle where greed, avarice, connivance, deception and duplicity flourish, and in which the most primitive appetites prevail.

To whatever extent the Applicant may have been responsible for his wife's wrongdoing, he has an additional and a very serious criticism to accept. There is, on the other hand, no suggestion whatever that he can excuse any of his conduct by blaming her. Indeed, the evidence indicated that he dominated actions in which they were both jointly concerned, even to the extent that he signed Roshan Arora's name to the documents, although she was the one with the legal power of attorney.

The other matter to which we wish to refer is the evidence of Mr. Raj Gupta, Mr. Rana's sponsoring broker who came before the Tribunal, at the latter's request, to give such evidence as he could in support of this application. All members of this Tribunal found Mr. Gupta to be a most impressive witness. He had originally been a customs officer in India and had later been a parole officer with Canada's National Parole Board for approximately 20 years. He is retired from that position and is now a licensed real estate broker and he has a number of registered salespersons with him. He described his assessment of Mr. Rana and what steps he would take to help him and supervise him if he got

his licence. If the Tribunal had considered Mr. Rana's conduct to be borderline, we would have had to take the evidence of Mr. Gupta very seriously in dealing with this issue before us. We refer to this witness and to his evidence to indicate clearly that we did not overlook his evidence, and also to make it clear that we were quite impressed by it. Indeed we have some regret that we could not give effect to it, but in the circumstances of this case the Tribunal finds on all of the foregoing such an overwhelming case against Mr. Rana that it must uphold the Registrar. Following the decision of Southey J. in Brenner and the Registrar of Motor Vehicle Dealers and Salesmen 19 CRAT at p. 58, far from taking any issue with the Registrar, we must strongly agree with his conclusion with regard to this application.

Accordingly, pursuant to the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

VINCENT J. SANSALONE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
MICHAEL E. LERANBAUM, Member
SADIE MORANIS, Member

APPEARANCES:

VINCENT SANSALONE, appearing on his own behalf

CHRISTINA CHRISTOPHE, representing the Registrar
under the Real Estate and Business Brokers Act

DATE OF
HEARING: 16 January 1991

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Vincent Sansalone applied for registration as a real estate salesperson under the Real Estate and Business Brokers Act in March 1984. Subsequently, he renewed this application in 1986, which application was not presented in evidence, and in 1988 and 1990. Each of these applications with the exception of the 1986 application has significance in the Proposal put before the Tribunal by the Registrar. The Proposal was dated March 9, 1990 and a Notice of Further Particulars was issued under date of October 18, 1990.

The initial application dated March 29, 1984, was received by the Registrar April 2, 1984. In that application, in answer to question 3(b) requesting information as to whether a registration had been refused, suspended, revoked or cancelled, the Applicant responded yes and inserted the words "impaired driving Nov 82/Feb 83." In response to question 7 with respect to any convictions, the Applicant had responded no. In the Registrar's Notice of Proposal in paragraph 4, the Registrar stated that Sansalone had failed to disclose his convictions of January 12, 1983. These convictions were identified in the Notice of Proposal as Personation under Section 361 of the Criminal Code and Driving While Ability Impaired under Section 234 of the Criminal Code upon which Sansalone had been fined \$500 and \$300 respectively.

In his Notice of Proposal, the Registrar stated in paragraph 5 as follows:

Notwithstanding Sansalone's failure to fully disclose his convictions of January 1983, and with knowledge of that non-disclosure, the then Registrar granted Sansalone registration as a salesman under the Act. (emphasis added)

The evidence before the Tribunal clearly corroborated the statement of the Registrar in his Notice of Proposal that the Registrar of the day was fully aware of the two convictions which the evidence indicated were both related to the same occurrence. Whether the Registrar of the day was satisfied that the identification of impaired driving in response to question 3(b) was sufficient disclosure to correct the error in question 7 is perhaps speculation. However, there is no doubt that Sansalone was registered as a salesman in 1984.

It is the view of this Tribunal that the question of disclosure and the nature of the application initially made by Sansalone should not be lightly used to revoke his registration on subsequent applications. It is the view of the Tribunal that unless such facts relate substantially to any subsequent offenses, the Registrar should not place much weight upon those items, particularly when a previous Registrar has accepted them. The Tribunal also notes that at the time of those convictions, Sansalone was only 22 years of age and presumably the offenses had taken place sometime prior to that date.

The second ground upon which the Registrar based his Proposal was with regard to the application for renewal dated April 25, 1988. In that application in response to the question regarding convictions, the Applicant answered yes and attached a sheet to the application form which stated: "Convicted of Credit Fraud. 1988. March, 14, obtaing (sic) credit by False Means. Sentenced to 7 month. in Jail." The Registrar conducted a criminal record search and found that the registrant was convicted of 9 charges of False Pretences under the Criminal Code and 9 charges of Attempted False Pretences under the Criminal Code for which he was sentenced to seven months and three year's probation concurrently on each of the charges, together with restitution.

He was also charged with Fraud under the Criminal Code with respect to two charges, and again was sentenced to seven months plus three year's probation on each charge concurrently, together with restitution.

In the Registrar's Proposal, he concludes that the recency and the nature of the registrant's March 1988 convictions,

demonstrate that Sansalone's past conduct affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty.

In fact, the evidence before the Tribunal indicated that the period of probation would not expire until October 1991, and it has been the current Registrar's practice not to permit registration under the Real Estate and Business Brokers Act while a person is serving a period of probation based upon convictions.

There is no doubt in the view of this Tribunal that there was disclosure in the application filed in April 1988. The Registrar submitted to the Tribunal, however, that because there were 20 convictions, there had not been sufficient disclosure. This creates a problem of trying to determine the adequacy of such disclosure. Is it the responsibility of the Applicant fully to provide particulars or is it sufficient to identify the circumstances recognizing that the usual practice in the Registrar's office is that further information may be requested and that interviews may also be necessitated.

In the circumstances of this particular case, it was also revealed to the Tribunal in the evidence that the application was in fact filed by the Applicant through his solicitor while Mr. Sansalone was incarcerated and, therefore, his access to fuller detail may have been substantially limited. In any event, the pith and substance of the convictions were identified in the sheet attached to Mr. Sansalone's application.

Notwithstanding the fact that the application was filed by Mr. Sansalone on April 25, 1988, the Notice of Proposal of the Registrar was not issued until March 9, 1990, almost two years later. Pursuant to the provisions of Section 9(8) of the Real Estate and Business Brokers Act, Mr. Sansalone's registration therefore continued under his 1988 application up until the date of the decision of this Tribunal arising from the hearing of January 16, 1991.

Mr. Sansalone in the view of this Tribunal, reasonably considering that his renewal application of 1988 had been continued, filed a further renewal application on March 20, 1990, presumably unaware of the issuance of the Registrar's Proposal of March 9 of that year. This resulted in Further Particulars being issued by the Registrar under date of October 18, 1990. The basis of the Proposal as stated in the further Particulars was for several reasons. The first was that Mr. Sansalone was not entitled to registration because of his continuing probation in respect to the 1988 convictions. The second reason, as stipulated in the Further Particulars, was that Sansalone had responded to the

question in the application regarding judgements in the affirmative and that the Registrar had written to Sansalone on July 6, 1990 requesting copies of the judgements and particulars regarding satisfaction thereof, and that Sansalone failed to respond and failed to provide proof that the judgement in favour of Merit Investments had been satisfied.

In the view of this Tribunal, the timing is significant. Mr. Sansalone in his evidence before the Tribunal indicated that his reason for failing to respond was that he had on May 22, 1990, requested a hearing before this Tribunal to deal with the Registrar's Proposal of March 9, 1990, and that all matters would be disposed of at that time. It is the view of this Tribunal that this is not an unreasonable position to have taken, and that the failure to respond to the letter of the Registrar in July 1990 should not penalize the Applicant.

The Tribunal is also much concerned with the time delay which has occurred in this particular matter. The only valid registration which is before this Tribunal in 1991 is that registration which was renewed in March of 1986, and yet by reason of the provisions of Section 9(8) of the Real Estate and Business Brokers Act, Sansalone's registration of 1986 is deemed to continue until the matter is disposed of by this Tribunal. This delay is a matter of considerable concern to the Tribunal. The Tribunal is aware of the decision of the Supreme Court of Canada in Regina vs. Askov and others reported at [1991] 113 National Reporter 241. While this case before the Supreme Court of Canada dealt with the rights of a person in criminal and penal matters to be tried within a reasonable time under the Canadian Charter of Rights, and the Tribunal is not aware of any case not dealing with criminal law to which the Charter of Rights has been applied, nevertheless, the Tribunal is concerned as to the rights of an applicant whose livelihood may be hampered if his renewal of registration is not dealt with in a timely fashion. The Tribunal is aware of the fact that the case of Lucien Brisebois is currently in process in which a lawyer has been convicted of professional misconduct in a discipline hearing, and the hearing it is argued was unduly delayed. In that case, the Askov decision is being argued as being applicable in that the result will deprive Brisebois of his licence to practice and, therefore, is penal in nature.

This Tribunal is not however, prepared, to rule against the Registrar in this instance because the matter is not covered under the criminal provisions of the Charter of Rights. He simply expresses its concern; perhaps a decision in this regard may very well be reviewed by a Superior Court in due course.

Because the Registrar has, as one of his duties the protection of the public interest and because the Registrar has enunciated from time to time that it is improper for a salesman to be registered under the Real Estate and Business Brokers Act while on probation, the Tribunal is of the view that the Registrar's Proposal in this case should be upheld notwithstanding the delays which have taken place.

The Tribunal, however, believes that Section 10 of the Act should be clearly made applicable to the Applicant Mr. Vincent J. Sansalone. It was clear to the Tribunal in the evidence before it that notwithstanding the precise wording in the probation order, there was an understanding between Mr. Sansalone and his probation officer that full restitution was not required to be made until such time as the end of his probation occurred. The evidence, moreover, before the Tribunal was inexact with respect to the outstanding judgments against Mr. Sansalone and whether satisfactory arrangements had been made to satisfy those judgements. Therefore, it is the view of this Tribunal that at such time as Mr. Sansalone's probation has been completed, whether by effluxion of time or an order abrogating such time, such fact would constitute a material change in circumstances as contemplated under Section 10 of the Act, and that upon such occurring, provided that Mr. Sansalone can demonstrate that he has complied with the terms of his probation in that he has made restitution and can satisfy the Registrar as to the propriety of payment or settlement of the judgements outstanding, the Registrar should consider a further application for registration by Mr. Sansalone.

The Registrar before this Tribunal has indicated on a number of occasions that registration should not be granted so long as someone is on probation, but in the view of this Tribunal in this particular case, the termination of probation without further passage of time, should be sufficient change in material circumstances so as to invoke the application of Section 10 of the Act.

Notwithstanding the foregoing, however, pursuant to the authority vested in the Tribunal under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to revoke the registration of the registrant.

TERENCE STEVEN TOUT

APPEAL FROM THE PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
RICHARD F. STEPHENSON, Vice-Chairman as Member
A. DONALD MANCHESTER, Member

APPEARANCES:

GAIL MIDANIK, representing the Registrar of
Real Estate and Business Brokers

No one appearing for the Applicant

DATE OF

HEARING: 22 July 1991

Toronto

REASONS FOR DECISION AND ORDER

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

JOHN EDWARD TOYE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
LUCIENNE BUSHNELL, Member
MAURICE LAMOND, Member

APPEARANCES:

MICHAEL W. BADER, representing the Applicant

JANE WEARY, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF
HEARING: 13 September 1991 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal pursuant to subsection (4) of Section 9 of the Real Estate and Business Brokers Act. The Applicant John Edward Toye filed an application dated September 13, 1990 seeking registration as a real estate salesperson. By a Proposal dated January 15, 1991, the Registrar gave notice that he proposed to refuse to grant registration to the Applicant. His reasons for the decision are stated to be:

In my opinion the Applicant is not entitled to registration under Section 6 of the Act as the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law, and with integrity and honesty.

Paragraphs 2 and 4 of the Particulars given state:

2. Disclosed on the application form was the fact that the Applicant did have a criminal record consisting of one conviction in 1987 for manslaughter for which a sentence of 15 years was varied on appeal in 1988 to ten years.

4. The serious nature of the conviction and the fact that the Applicant remains on Parole for a further six years lead the Registrar to conclude the Applicant's integrity and compliance with the law fall short of the requirements of the Act.

Paragraph 3 of the Particulars quotes a somewhat lengthy letter from the Applicant to the Registrar in response to a request for particulars of the offence to which we shall refer later.

The sole ground upon which the Registrar seeks to refuse the application is that this Applicant comes within the provisions of Section 6(1)(b) of the Act in that his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. In order to determine the proper disposition of the case, the first thing that must be done is to set out in order and in some detail, the relevant facts established at the hearing to which the proper propositions of law must be applied. These facts include certain details of the life history of the Applicant up to the time of the commission of his crime, certain circumstances of the commission of the crime and certain details of his life history since that time.

The Applicant was born in 1947 in England and was brought by his parents to Canada at nine months of age, and he has lived in/or about Toronto all his life except when in prison. He completed primary and secondary school quite well, but did not go to College. He had his first job at ten years of age, a paper route, and while still in school had a number of jobs at which he showed above average ability and achievement. At 12 he was delivering on a bicycle for a drug store and by 14, he was entrusted by his employer with taking in the cash. He managed a Becker's store one summer before he was 16, and at 16 he was working for Macs Milk going about training managers for its stores.

At eighteen, he left school and pursued a financial career on Bay Street, beginning with the brokerage firm Greenshields Inc. Soon he was handling millions of dollars in securities in "the cage". He moved from there to Royal Securities and then back to Greenshields as a Trader, until 1978 when he wanted a new challenge and he went briefly into Real Estate where he was successful. However, he went back to Bay Street in 1979 partly because he missed the action of the market and partly because his wife did not like the uncertain income from Real Estate. He joined A.E. Ames & Company as an International Trader.

There he was dealing only with trades of five million dollars or more and would do six hundred million up to one billion dollars in business in a day.

After A.E. Ames was bought out by Dominion Securities, he went to Merrill Lynch. In one year, he and another trader there made the company two million dollars profit out of its total for the year of four million dollars. As part of a reorganization, the parent company wanted him to move to New York, but he did not wish to go. The company offered him \$7,000 severance pay which his lawyer advised him to take. He refused and subsequently got \$25,000. He then went to Burns Fry as head of its international money market operation. For some years he was making between eighty and one hundred thousand dollars, sometimes getting large bonuses. Up to this point, the Applicant's record shows him to be industrious, hard-working, strong willed, above average intelligence, honest and reliable. His appearance as a witness at this hearing corroborated these general impressions.

However, on March 5, 1986 he committed a criminal act, namely he killed his wife in circumstances for which he was charged with second degree murder, and on June 26, 1987 at a trial at which he was convicted of manslaughter by a Jury, he received a sentence of 15 years which was later reduced by the Court of Appeal to 10 years. In outlining relevant details of this, we shall first quote those details which the Applicant furnished to the Registrar on October 18, 1990 in response to his request for the same and then we shall add some of the facts which came out in the evidence at the hearing. The Applicant's response with details read:

Further to your request for details of my criminal conviction, I am a first time offender, convicted on June 18, 1987 of Manslaughter, in the death of my wife.

- after a very difficult marriage of 10 years, I finally asked for a divorce on November 4/85
- against my lawyer's wishes, but to avoid any further abuse, I moved out of the matrimonial home on February 1, 1986
- I returned to my home on March 5, 1986, to baby sit, whereupon my wife continued her assault.
- out of that assault and my depression, I killed my wife.
- I was charged with 2nd degree murder (having intent to kill, without premeditation) on March 28, 1986
- I remained out on Bail, until my trial on June 6, 1987
- after a jury trial, I was found NOT GUILTY by the

12-person jury after a short deliberation

- I was, of course, found Guilty of the lesser charge of manslaughter because of my admitted responsibility in my wife's death

- I initially received a 15 year sentence, but won an appeal reduction to 10 years

- I have since cascaded down through the Penal System (Millhaven-Maximum security, Warkworth-Medium security, Beaver Creek-Minimum security)

- I obtained Limited Day Parole, July 17, 1989, while at Beaver Creek where I worked in the community building cottages for 10 days per month and travelled home 3 days per month.

- On February 7, 1990, I received Day parole and moved to a half-Way House in Toronto on February 20

- I am required only to spend 7 hours per night in the House and can work or go to school (Real Estate Courses) and be with my family.

- I live at my parents home on weekends with my two daughters.

- I am eligible for Full Parole now (October 25, 1990) and the paperwork is proceeding to achieve my release, probably within the next few weeks.

- From the arresting Police Officers, through the Courts, and through the entire Penal System, I have not been viewed as a threat to Society, hence, the constant support by all parties concerned to move back into Society.

I deeply regret the events of 4 1/2 years ago, but I now must try to move ahead and pick up as many pieces as possible, especially for my two daughters who are anxiously awaiting my return. I sold Real Estate approximately 10 years ago and enjoyed it, so I decided to return to something that I know and enjoy. The time, expense and energy involved in restarting and also in taking the Real Estate courses again have been considerable, so I ask that you expedite my application as soon as possible.

I might also add that, as I started the real estate courses last May, I wondered if I would have trouble obtaining my License; The John Howard Society (Mississauga) offered to investigate and was told quite clearly that, since my conviction was not related to fraud, I would not be denied a license, only that a disclosure of my conviction would be necessary. I did carry on then, reassured, and made by application to you on September 18, 1990.

After the time and anguish that has passed, it is difficult to keep dragging up the details but I trust that the above synopsis is satisfactory for whatever your needs are.

Thank you for your consideration and assistance.

Facts which came out in the evidence and should be added are the following:

After February 1, 1986 when the Applicant moved out of his home he began living with another woman, but this relationship broke down before March 5 of that year. However, his wife became aware of it and this appears to have been the real reason for her verbal assault upon him on that day. He had gone back to the house to look after the children, two daughters, so his wife could go somewhere, and also for the purpose of packing up and taking some of his belongings with him. As soon as he got there his wife verbally attacked him on a number of rather small and not very consequential points, but all amounting to a real tirade. Later when he saw his wife drive back home, he said that he "tensed up and picked up a knife in the kitchen and took it with him out to the car for he intended to tell his wife that it was all over between them and she should leave it alone". The result of all this was that he criticized her for raising the criticisms which she had done, she admitted they were not the real reasons for her anger and that the real reason was his going with the other woman, the quarrel escalated, and he killed her with the knife.

He was on bail 15 months pending his trial in June of 1987 and kept all of its terms exactly. In giving the Judgment of the Court of Appeal which reduced his sentence from 15 to 10 years, Zuber J.A. made some very important comments:

The Appellant other than this offence has no record. His work record is good and he was involved in community affairs. There is nothing to suggest that he is a continuing danger to society. On release, he would no doubt become again a useful member of society.

A few facts from the period of his serving his sentence should also be added to those set out in the Applicant's written response of October 18, 1990. While in Milhaven Penitentiary, he attracted an attack by some bullies among the inmates and he refused protective custody and used the incident to leverage the

Warden into an early transfer out of that prison. He indicated that he refused to be intimidated by these fellows. Later on at the Beaver Creek Institution, he put himself at serious risk in defending a staff member against an attack by an inmate. Throughout his time in prison, he showed a keen appreciation of the hopelessness and helplessness of many inmates and the potential "violence" to which that led, the motivations and actions of both inmates and prison staff, and the determination to keep himself on the right side of things and to fight back where he considered himself to be attacked by anyone - the same characteristics which were pronounced in his whole life previously including his dealings with his wife.

In his record of living up to all requirements of trust and of service to employers and to the community allowed to him and of observing all the terms of his parole, he is exemplary.

There were two issues of fact in connection with which Counsel for the Registrar called the credibility of the Applicant into question. The first of these was an issue of what the Applicant and the John Howard Society were told in response to telephone enquiries of the Registrar's office as to the chances of the Applicant obtaining registration, which inquiries were made by and on behalf of the Applicant prior to his embarking on the Real Estate course. The second was an issue as to what the Registrar said at a meeting in his office with the Applicant and the Registration Officer assigned to his case, one Lorraine Drouin, upon the question as to which person should receive the more favourable consideration on such an application, one convicted of a serious offence who earns early parole or one who comes having completed his term of incarceration. We do not have to go into details concerning either of these because in neither case did we conclude that the credibility of the Applicant was diminished.

It should be added that in describing the aforementioned discussion in the Registrar's office, the Applicant was making a serious criticism of the Registrar's judgment of the effect of parole in such a case in telling the Tribunal that the Registrar said he preferred an Applicant who completed his term of incarceration to one who was out on early parole. The Registrar was not cross-examined on this matter when he gave his evidence in chief. In re-examination, the point was somewhat put in issue but the answer dealt with the distinction between an applicant who has completed parole and one who has not yet done so rather than the distinction which Mr. Toye said the Registrar made. Mr. Toye gave his evidence as to this conversation after the Registrar's evidence and the Registrar was not called in reply. Ms. Drouin, who was called, could not remember details of this and neither the notes which she made or those the Registrar made, helped to resolve this

conflict. The Registrar was clear and unequivocal in his evidence throughout, that one of the reasons for his conclusion was the fact that the Applicant is still on parole and referred to his general policy not to licence persons who are still on parole or on probation. This is quite a different issue. The distinction between a convict who has completed his sentence either through incarceration or parole and one who has not yet completed it is quite different than the issue between one who completes it with as much parole as possible and one who earns no parole.

Finally on behalf of the Applicant, we must refer to the seven letters filed by his counsel, one from a Real Estate Broker (not his sponsoring broker) advising that it will employ him if he obtains registration and six from personal friends, all of good and responsible standing in the community attesting to the good character which he has established. We must also refer to the evidence of Mr. James, his parole officer, who reinforced all of the positive things established about the Applicant during his period of dealing with him and from his knowledge of the records of the correctional system.

We must now turn to the evidence of the Registrar which must be taken into account. In the first place it is clear and unequivocal that the Registrar has formed the belief that, based upon his past conduct, the Applicant will not carry on business in accordance with law and with integrity. It was interesting that in his evidence, he did not seek to rely on the third part of the definition dealing with honesty, although it is included in his proposal. He made this distinction because he conceded that there was no evidence of any action by way of fraud, theft or related offence on the part of the Applicant, but he said he considered acting in accordance with law and with integrity encompassed a much wider course of conduct than simply keeping the commandment "Thou Shalt Not Steal".

The Registrar concedes that there is no issue of any dishonesty on the part of the Applicant in completing the application or in furnishing information to the Registrar either in writing or orally (another reason for the finding noted above as to the Applicant's credibility). And he puts his case solely upon two grounds:

1. The seriousness and the recency of the conviction for manslaughter.
2. The fact that the Applicant is still on parole.

It is the policy of the Registrar to refuse registration to anyone while still on parole or probation following a conviction. He supports this position by saying that during such period the person is still under the supervision of the Court and that, unlike the situation with a pardon, the person is still serving his sentence, albeit under more favourable circumstances. He puts it that the criminal justice system has given the parolee a chance to prove himself and in the course of doing so, to better himself but, until the opportunity has been completed, we do not know with what result and he, the Registrar, does not intend to prejudge the situation or to second guess the Courts or the criminal justice system.

He also stressed the fact that the Real Estate and Business Brokers Act is a consumer protection statute and he sees it as his primary function to protect the public and, to the extent that it is appropriate, to be the instrument of the desires of the public in such a matter. In dealing with this application, the Registrar said that the granting of parole has given the Applicant an opportunity to prove himself but he must proceed to do so by completing the parole before we shall have the answer as to whether the decision to grant the parole was a correct one. There is a perception in a regulated industry that persons who are licenced have met certain standards and in a case such as this, these standards are not met until a term of parole is completed.

From all of this the question which the Tribunal must determine is whether the past conduct of the applicant affords reasonable grounds for the Registrar's belief and whether the Tribunal can say that it thinks the Registrar in error in so concluding. These same questions were faced by the Tribunal in the case of Jimmy De Maria decided by the Tribunal on April 10, 1991. At the opening of that Judgment at the top of page 2 of the report which we have, it states:

Since the most critical question for determination by the Tribunal is the application of the test laid down by Southey J. in the often quoted case of Brenner and the Registrar of Motor Vehicle Dealers and Salesmen, a good point of beginning will be to set out this test.

Near the bottom of page four of the report of which we have, Southey J. puts it:

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

Mr. Bader presented to the Tribunal a very able argument to the effect that the passage quoted from the Brenner decision was *obiter dicta* and that the real and only ratio of that decision is found in the words of Southey J. earlier to the effect, "We are all of the view that the Tribunal appears to have applied the wrong test in determining whether the proposal made by the Registrar should have been carried out." It is clear from a reading of the whole Judgment that the Divisional Court made its decision to send the matter back to the Tribunal for a rehearing on the basis that it, the Tribunal, had applied a wrong test in coming to its conclusion, and it identified clearly what that wrong test was. However, with respect, the Tribunal cannot agree with counsel for the Applicant when he urges us to disregard the statement of Southey J. as to the effect in Section 7(4) for two reasons.

In the first place, in sending a case back for a rehearing as the Divisional Court did, the Tribunal would note, with respect, that it was appropriate not only for it to identify the wrong principle which resulted in the error, but also to give some indication of the correct principle which it thought should be applied and this would appear to be what Southey J. was doing in the passage under attack by counsel for the Applicant.

Secondly, this passage from the Brenner decision has been quoted with approval and has been followed in many subsequent decisions of this Tribunal and has formed part of the ratio of many such decisions. Even if this statement is *obiter dicta* (with which conclusion we do not agree for the first reason given) it can still be, and again, with respect, in our view is a sound statement as to the proper effect of Section 7(4). (In this case Section 6(1)(b) of the Real Estate and Business Brokers Act).

Having reached this conclusion, the Tribunal must approach the question in a manner consistent with that applied in the substantial number of cases in which this test has been applied since the Brenner decision. Before we can assist the applicant,

we must decide that the Registrar was in error in reaching his conclusion. There is no doubt of the honesty and sincerity with which he holds his belief. The question is whether there are reasonable grounds for his doing so.

In the De Maria decision at the top of page 9, the Tribunal said:

It is most important to appreciate that the decision which the Tribunal has to make is not whether it would come to the same conclusion or belief as has the Registrar upon the issues, but whether there are reasonable grounds upon which the Registrar could come to the belief and conclusion which he has.

There are some other very important considerations to be appreciated in deciding this issue correctly in this case. It is not the function of either the Registrar or the Tribunal either to add or to subtract from the punishment meted out to the Applicant by the Criminal Courts and system. Neither are the principles upon which sentences and subsequent dealing with convicted persons are determined our concern.

Next, we would note that the considerations which led Zuber, J.A. to say "there is nothing to suggest that he is a continuing danger to society. On release he would no doubt become again a useful member of society" are not necessarily the same considerations as those upon which the Registrar must reach his belief under Section 6(1)(b) of the Act.

We must also have clearly in mind that this hearing is a hearing of first instance and not an appeal from a previous decision. In this connection see:

Re Dabor Motors Limited and MacCormac (1974), 5 O.R. 473 per Henry, J. at page 476. "The Legislature has created a scheme in which he (the Applicant) may state his side of the case before a properly constituted tribunal under the Act, namely, the Commercial Registration Appeal Tribunal and not by way of an appeal but in the first instance. It is important that it be recognized that s.7(4) maintains the position of the parties as one in which the Registrar is the applicant who must make his allegations before the tribunal and the registrant is the respondent who if he desires to do so may reply

to the allegations made against him.

In these circumstances, in our view, the Legislature has provided the necessary scheme which satisfies the requirements of natural justice, always assuming of course that the hearing before the tribunal is properly conducted. It is not a sine qua non of the principles of natural justice that the effective decision cannot be referred from one person who has a function to perform in the process to another. The proper interpretation of the statute as we hold is that, assuming the registrant requires a hearing, the real and only decision as to whether or not his registration is to be suspended, is that of the tribunal when it makes the determination that the Registrar shall be authorized to proceed or shall be prohibited from doing so. Subsection (4 of s.7 makes this clear in the final words where it says that "the Tribunal may substitute its opinion for that of the Registrar" which of course it does after fully hearing both sides.

The Tribunal does not find the principle laid out in the Dabor Motors case to be in conflict with the view which it has taken of the decision in the Brenner case. The decision in the Brenner case merely directs the Tribunal as to certain principles which should be followed in the conduct of this hearing and in the determination of certain issues which are raised.

Counsel for the Registrar argued that the Registrar has reasonable grounds for his belief based upon the gravity and the recency of the offence of the Applicant and she referred to the Jakobs case (1987) 16 CRAT 223 at p.226:

An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act. "Integrity and honesty" are not merely words. They are standards that must be met.

Another important principle is laid down in the Jakobs case also at page 226:

However, the Tribunal must weigh the interest of the public against the

interests of and sympathy it may have for the Applicant. On balance, the public interest must prevail in this case.

Counsel for the Registrar supported the second reason given by him for his belief on the basis of having and making public the policy of not licensing persons on parole or on probation has merit and avoids a serious problem of public perception of the licensing process. In support of the first point, he referred to the DeMaria decision, at page 9, the second paragraph:

There are, however, a number of other things which should be added. I referred at the outset to a general practice followed by the Registrar of refusing to license an Applicant while on probation or parole following a criminal conviction. This practice was criticised by Counsel on behalf of the Applicant as being arbitrary but, as a general rule, the reverse is probably the case. With such a large number of applications annually and such limited facilities for dealing with them, the Registrar appears to us to improve the system by putting in place bench marks, where he can, which are of guidance to Applicants as well as to himself and to the Industry.

In support of the second point, she submitted that public perception is always an important consideration and, since the public is entitled to look to the registration process as primarily in place for its protection, if it becomes known that persons of questionable background are being registered, this would create a bad perception and a bad situation for the industry and in support thereof cited the Chartrand case (1988) 17 CRAT 199:

Counsel for the Registrar submitted that the Applicant should not be considered for registration until such time as the Applicant's sentence has been served and his parole completed in 1993. Counsel referred the Tribunal to the decision of this Tribunal in the second Brian F. Sunderland case reported at 16 CRAT Summaries of Decisions (1987) p.125 in similar circumstances. That decision

referred to the first Sunderland decision that consideration for registration could be given "depending upon the circumstances in which he achieves the expiration of his parole." The Tribunal in the second Sunderland case came to the conclusion that Sunderland was in the process of rehabilitation but that the process was not yet completed and would not be so completed at least until the expiration of his parole. In the present case, Chartrand has been released from his controlled supervision only within the past week, July 5th, 1988, and will continue under parole until March 4th, 1983.

This Tribunal approves the decision of the Tribunal both in the first and second Sunderland case, that a period of rehabilitation is necessary to establish that an individual no longer lacks honesty and integrity and will conduct his business in accordance with the law. It is also the view of this Tribunal that the period of sentence, including any parole period within that time should reasonably be considered as the minimum rehabilitation period.

Counsel for the Applicant made two arguments essential to his success at this hearing, namely, that there was nothing in the past conduct of the Applicant as a result of which one could reasonably believe he would not conduct himself in the future as required by the statute and that the rule or policy of the Registrar that he would not register a person on parole was unsound and improper. In support of this first submission, he referred to all of the evidence of good and, indeed, even exemplary conduct on the part of the Applicant and the supportive opinions of the parole officer and his friends and acquaintances who provided letters.

In support of the second submission, he cited a decision of the British Columbia Supreme Court Hale v. Corporation of the City of White Rock Board of Variance (1986) 16 Admin.L.R. 313 per Proudfoot J. at the bottom of p.315:

I would be hard pressed to conclude that the Board in the case at Bar considered its duty under s. 727(2). On the contrary the Board had a policy that "after-the-

fact" applications would not be allowed. The Board can and does create policy. But policy cannot override a statutory duty.

H.W.R. Wade on Administrative Law (4th ed., 1977) accurately sets out the proposition [at p. 317]:

"OVER-RIGID POLICIES

Policy and precedent

An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid down in advance. It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time. In enforcing this rule the courts are underlining the difference between judicial and administrative processes. The legal rights of litigants are decided according to legal rules and precedents which are sometimes held to prevail over the court's own opinion. But if an administrative authority acts in this way its decision is ultra vires and void. It is not allowed to 'pursue consistency at the expense of the merits of individual cases'."

This matter ought to be heard at an appropriate hearing and s. 727(2) of the Municipal Act complied with; the matter should be dealt with on its merits. Accordingly, I quash the order made by the Board of Variance and remit for the matter for such hearing.

With all of the foregoing in mind, the Tribunal has come to the conclusion that it cannot find the Registrar in error in his opinion that the past conduct of the Applicant affords reasonable

grounds for belief that he will not carry on business in accordance with law and with integrity. We agree with the Registrar's concern arising out of the seriousness and the recency of the offense. Killing his wife in the circumstances described here was certainly very serious. While the evidence indicated that he probably used the knife in a fit of passion (the jury must have so concluded to reach its verdict), he did not pick up the knife in the kitchen and take it with him out to the car for this last encounter with his wife in such a state. We cannot say that the Registrar is in error in his resultant concern with an Applicant in these circumstances. The recency of the offense as a ground for his belief is tied in with the ground of his policy of not licensing such an Applicant while on parole.

The seriousness of the concern identified above is not something which can be easily, quickly or lightly met. While the Tribunal agrees that such a policy should not be applied blindly without exception to every case like the bed of Procrustes, this does not mean that it is not generally a sound and useful rule. It does mean that it should always be considered that the special circumstances of an individual case may render it properly an exception. The Registrar himself stated in his evidence in the DeMaria case above mentioned, that there would have to be an exception in an otherwise appropriate case for registration when, as there, the Applicant would be on parole for all of his life. There may well be other grounds or circumstances upon which such an exception should also be based, but the Tribunal does not find this case to provide the same. We think it inappropriate to go further on this point here. A decision on this question should be determined on the facts of each individual case.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

LINDA ALBERT

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
DETERMINING CLAIM OF THE CLAIMANT

TO BE NOT ELIGIBLE FOR PAYMENT

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
JOHN MCGUIRE, Member

APPEARANCES:

LINDA ALBERT, appearing on her own behalf

NATALIJA POPOVIC, representing the
Board of Trustees

DATES OF

HEARING: 16 September 1991

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Linda Albert from the decision of the Board of Trustees of the Travel Compensation Fund disallowing her claim for compensation after her return from a vacation in Tampa, Florida. The facts which are not in dispute are set out in a Statement of Facts and Issues by counsel for the Registrar as follows:

TRAVEL INDUSTRY ACT
HEARING UNDER SUBS. 16(3) OF SCHEDULE TO REG. 938
RE: LINDA ALBERT AND IBRAHIM ALBERT ("ALBERTS")
AND THE WHOLESALE TRAVEL GROUP LTD. ("WHOLESALE")

STATEMENT OF FACTS AND ISSUES

A. FACTS

1. At all material times, the Alberts were each a "client" and Wholesale was a "travel agent" within the meaning of the Travel Industry Act ("the Act") and Regulation 938 thereunder ("the Regulations").

2. The Alberts contracted with Wholesale for provision of "travel services" within the meaning of the Act, and Regulations and other goods and services for a holiday

for themselves and their one year old son in Tampa, Florida commencing January 6, 1990 through to January 20, 1990 inclusive.

3. The Alberts departed on January 6, 1990 and returned on January 20, 1990 as scheduled.

4. Upon arrival in Tampa the Alberts were dissatisfied with the hotel accommodations at the hotel arranged for by Wholesale and as a result acquired alternative accommodations at another hotel.

5. The second accommodations were less expensive than those originally arranged for; as a result the Alberts claim for the difference in the cost of the two hotels in the amount of \$240.00.

B. ISSUES

6. Is the Alberts' claim based on cost, value or quality of services provided and if so, is it therefore precluded by section 15(1) of the Schedule to the Regulations?

7. Did the Alberts receive the travel services they contracted for at no additional cost.

To these issues put forward by the Registrar, Ms. Albert adds one further "What is the fund's liability relative to the actions of its representatives (i.e. Does the fund have the responsibility to honour declarations made by its representatives/employees")?

Ms. Albert in her evidence said that upon arrival at the hotel in Tampa, the family found the accommodation both unclean and unsafe. Alternative accommodation was thereupon obtained through the travel agent which was in her words "moderately satisfactory". The agent there (acting on behalf of Thomson Vacations, the original booking agent) told her she should make a claim for the difference in price of the accommodation in the sum of \$240 and upon her return, Ms. Albert attended at the Thomson Travel Agency in Mississauga, where she was advised the agency would send her a cheque for \$240.00.

Shortly, thereafter, however, the travel agency went into receivership and she took her complaint to one John Langton of the office of the Travel Compensation Fund. She said in her evidence that Mr. Langton told her she had a claim and gave her the

necessary documents to be completed and sent to the fund. After considering her claim, however, it was disallowed by the Board of Trustees resulting in this appeal.

The Board quite properly decided the claim fell within Section 15(1) of the Travel Industry Act which reads:

A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of moneys so paid to the extent only that such services are not so provided and after he has made a demand for payment from the participant that the participant has refused without legal justification to pay or is unable to pay by reason of bankruptcy or insolvency, but a client is not entitled to claim for a refund of any money paid by him to a participant where the client has been provided with travel services or alternative travel services and such claim is based on the cost, value or quality of the travel services provided.

The first issue raised by counsel for the Registrar "Is the claim based upon the cost value or quality of the travel services." The answer, of course, is in the affirmative since Ms. Albert is asking \$240 for the difference in cost of the accommodation provided and that which she expected or had paid for. The evidence, however, is that she received the alternative accommodation which was "moderately" in her words satisfactory. There is no question, therefore, that her claim falls within the exclusion and consequently must on that basis be disallowed.

On the second issue, did the Albert's receive the travel services they contracted for at no additional cost, it is not denied they received the services and it is also admitted there was no additional cost. On that point, the claim must also fail.

The third issue raised by Ms. Albert is the question of whether or not the Trustees of the Compensation Fund are bound by a representation either of the travel agent (Thomson) or the fund's representative Mr. Langton. Clearly it is not bound by any statement made by an employee of Thomson which obviously was made on behalf of that agency, i.e. that a cheque would be sent to her.

As far as Mr. Langton is concerned, it is not clear from the evidence exactly what the nature of the conversation was, but it was evident that he had provided Ms. Albert with the forms to file the claim. In our view, although this employee may have formed an opinion on the facts as he understood them which he expressed to Ms. Albert, he had no authority either to decide the issue or order the fund to compensate her. He further could give no assurance the claim would be honored by the fund.

This claim falls properly within Section 15(1) of Regulation 938 which specifically precludes recovery under the circumstances and is, therefore, disallowed.

ASCENT TRAVEL GROUP INC.

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES
UNDER THE TRAVEL INDUSTRY ACT

DETERMINING CLAIM NOT ELIGIBLE FOR PAYMENT

TRIBUNAL:

GORDON R. DRYDEN, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
GLORIA ANEVICH, Member

APPEARANCES:

A. MARTLIN, agent for the Applicant

MICHAEL D. LIPTON, representing the Board of Trustees,
Travel Industry Act

DATES OF 2, 3, 4, 18 October 1990

HEARING: 7, 8 May 1991

Toronto

DECISION AND ORDER

Upon the withdrawal of it's claim by the applicant and upon
the consent of both parties that:

1. An order be made refusing to allow the claim
2. That the applicant has undertaken not to appeal
this order
3. That all of the Exhibits filed herein be released
forthwith to the party filing them.

By virtue of the authority vested in it under Section 16(3)
of the Schedule to Revised Regulation 938 under the Travel Industry
Act, the Tribunal hereby makes an order accordingly.

LAVONNE BYRON

APPEAL FROM A DECISION OF THE BOARD
OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
JOHN MCGUIRE, Member

APPEARANCES:

LAVONNE BYRON, appearing on her own behalf

NATALIJA POPOVIC, representing the
Board of Trustees

DATE OF HEARING: 6 November 1991 Toronto

REASONS FOR DECISION AND ORDER

This is a claim by Ms. Byron for compensation under the Ontario Travel Industry Compensation Fund pursuant to the Schedule to Revised Regulation 938. The facts are not in dispute. Ms. Byron purchased from Kisedee Tours and Travel Inc. ("Kisedee") a return airline passage to St. Kitts, West Indies, scheduled to depart on December 23, 1989 and to return January 6, 1990. She paid Kisedee the sum of \$533.00 for these travel services on November 21, 1989.

Prior to Ms. Byron's departure date, the status of Kisedee Tours and Travel Inc., which had been registered as a travel wholesaler under the Act, was terminated and, as a result, Ms. Byron had to purchase a ticket elsewhere in order to proceed with her travel.

She subsequently made a claim against the Compensation Fund, which claim was denied on the grounds that, pursuant to Section 16(1) of the Schedule, a consumer was only eligible to claim compensation, from the Fund when the services had been purchased from a participant who is a travel agent rather than a travel wholesaler.

Subsequently, Ms. Byron attempted to obtain some compensation by bringing an action in the Small Claims Court. She

did obtain a judgement against Kisedee, however, as this company is no longer in business, the judgement would appear to be virtually uncollectible.

The Small Claims Court Judge who heard the matter recommended to Ms. Byron that she submit another claim to the Compensation Fund, expressing the view that it was not reasonable that Ms. Byron be expected to enquire whether Kisedee had been a wholesaler or a travel agent. Accordingly, Ms. Byron made another claim to the Compensation Fund on January 7. That claim was also deemed ineligible for payment since the first requirement, namely that the client has made payment to a travel agent, had not been satisfied. Ms. Byron then requested a hearing by this Tribunal.

We also note that at the time that Ms. Byron purchased her ticket, Kisedee was apparently operating out of premises that were on the street level of Lakeshore Boulevard which were clearly open to the public.

Ms. Byron, at the time that she purchased her ticket, did not make an inquiry as to whether the vendor of the travel services was a travel wholesaler or a travel agent. The Tribunal feels that she can not in any way be blamed for not making that inquiry as it is not reasonable to expect the average consumer to know the difference, much less know that entitlement to compensation from the Compensation Fund somehow hinged upon that distinction. It is apparent to the members of the Tribunal that Ms. Byron is a victim of circumstances who, in fairness, deserves to be compensated. However, the Tribunal has no jurisdiction to award such compensation to Ms. Byron. The Regulation clearly states that compensation can only be given where the consumer purchased travel services from a participant who is a travel agent.

This very issue was previously considered by this Tribunal in the case of Fisk and the Board of Trustees (1987) CRAT 272. The Tribunal cannot see any basis to distinguish this situation from the Fisk case.

The Tribunal does wish to note, however, that since the Fisk decision, there have been some amendments to the Travel Industry Act. At the time of the Fisk decision, the Tribunal noted that there was nothing in the Act that prohibited a travel wholesaler from selling travel services to the public. Subsequently, the Act was amended in 1988 including Section 3(1) of the present Act which provides that "No person shall act or hold himself out as being available to act as a travel agent unless he is registered as a travel agent by the Registrar." Section 1(e) of the Act was also amended to define "travel agent" as a "person

who sells, to consumers, travel services provided by another person." Of course, these amendments do not assist Ms. Byron since Kisedee chose to ignore Section 3(1) of the Act.

Although Kisedee was terminated as a travel wholesaler, based upon what Ms. Byron has advised, it appears that the principals of Kisedee may now be operating under the name Carib Tours. The Registrar may wish to insure that this Company is operating in compliance with the provisions of the statute.

By virtue of the authority vested in it under Section 16(3) of the Schedule to Revised Regulation 938 under the Travel Industry Act, the Tribunal disallows the claim.

IMPERIAL LIFE ASSURANCE COMPANY OF CANADA

APPEAL FROM A DECISION OF THE BOARD
OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL:

JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
PETER BONCH, Member

APPEARANCES:

GLEN MELHUISH, representing the Applicant

MICHAEL D. LIPTON, Q.C., representing the
Board of Trustees, Travel Industry Act

RANDY WALTERS Party
J.R.C. TRAVEL MARKETING INC. Party

DATES OF HEARING: 7, 8, 9 August 1991 Toronto

DECISION AND ORDER

UPON Mr. Randy Walters appearing on his own behalf and on behalf of J.R.C. Travel Marketing Inc. and upon the consent of counsel for the Imperial Life Assurance Company of Canada and the Trustees of the Board of Trustees of the Compensation Fund, it is hereby ordered that the said Randy Walters and J.R.C. Travel Marketing Inc. be added as parties to this appeal.

This hearing continuing on this day August, 9, 1991 and upon the consent of all parties, this appeal is hereby dismissed.

SUPREME COURT OF ONTARIO
(DIVISIONAL COURT)

BETWEEN:

ASSOCIATED AUCTIONEERS INC. AND JOHN BRUCE MCKENZIE
Appellants
andTHE REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
Respondent

DATE: April 9, 1991

Endorsement: (of Mr. Justice McKeown).

The Tribunal accepted that the past conduct of McKenzie, the present operation, the conviction under the Act, and the failure to disallow pending charges were all serious matters which caused the Registrar to refuse registration. While we do not agree that there was any obligation to disclose pending charges there was evidence upon which the Tribunal could support the Registrar's decision to refuse registration based on the other serious matters. There was evidence to warrant the finding that the appellant Associated Auctioneers did not meet the standards of section 5(c)(ii) and the appellant, McKenzie, did not meet the standards of section 5(1)(b) and section 5(1)(d). The appellant Associated Auctioneers being a corporation does not have to meet the standards in section 5(1)(d). See Reid J. in Re Coates vs. the Registrar of Motor Vehicle Dealers & Salesmen (1988) 65 O.R. 2d 526 at pp.534-535.

At the hearing the appellant took the position that if registered, they would not change their operation. As the Tribunal stated at p. 10, "It may well be that successful lobbying will see the changes to the Act which McKenzie wants, but he cannot simply violate the Act as it now is just because he doesn't like it". It is not open to the appellant to say before this court that they will now comply in all respects with the present law when this is contrary to their position before the Tribunal.

The Tribunal and the Registrar were not in error in concluding that the past conduct of the appellants afforded reasonable grounds for belief that they would not carry on business in accordance with law and with integrity and honesty. The Tribunal's decision can be supported with respect to the appellant's Associated Auctioneers allowed under sections 5(1)(c)(ii) and McKenzie under section 5(1)(b) - 5(1)(d). Therefore there is no error in law. The appeal is dismissed with costs in the amount of \$2,500 being the amount agreed by counsel to the Respondent.

IN THE SUPREME COURT OF ONTARIOONTARIO COURT (GENERAL DIVISION)

B E T W E E N :

STEPHEN J. KUBAN	)	<u>Donald Rollo</u>
	)	for the applicant
Applicant)	
)	
)	
)	
- and -	)	<u>Robert Ratcliffe</u>
	)	for the Registrar
THE REGISTRAR OF REAL	)	of Real Estate and
ESTATE AND BUSINESS	)	Business Brokers
BROKERS and THE REGISTRAR)	
OF THE COMMERCIAL REGISTRATION)	
APPEAL TRIBUNAL)	
Respondents)	

McRAE J:
(Endorsement)

I am not satisfied that there is sufficient urgency demonstrated to bring the applicant within section 6(2) of the Act. The fact is he has now been unlicensed since December 2, 1990. He has been aware since June 6, 1991 that his appeal hearing cannot be heard before January, 1992. While he will suffer financial hardship, the delay involved in bringing this application on (it should have been brought in a timely fashion before the Divisional Court) would not likely involve a failure of Justice. Therefore, the application for leave pursuant to Section 6(2) is dismissed. No costs.

SUPREME COURT OF ONTARIO
(DIVISIONAL COURT)

B E T W E E N :

EDWARD AND JOZEFINA LACIKA

Appellants

- and -

COMMERCIAL REGISTRATION APPEAL TRIBUNAL

Respondent

BEFORE: O'LEARY, MONTGOMERY AND CAMPBELL, JJ.

DATE: January 18, 1991*

DISPOSITION:

In our view, there is ample evidence to support the findings of the Appeal Tribunal that the home was substantially completed, indeed at least 97% completed by September 15, 1989, that an occupancy permit had been issued and the appellants were under an obligation to close the transaction on September 15, 1989 but failed to do so and accordingly could prove no liability. The appeal is dismissed. No order as to costs.

The appellant, Mr. Lacika appeared before us in person and has pressed his own argument for three hours before telling us he had nothing further to add.

.....

Mr. and Mrs. Lacika v. The Ontario New Home Warranty Program

BEFORE: LACOURCIERE, CARTHY AND ARBOUR, JJ.A.

* - Motion by Mr. and Mrs. Lacika, applicant/appellant, for leave to appeal from the order of the Divisional Court pronounced Jan.18/91. Applicant appeared in person. N.T. Rutherford for respondent. Motion dismissed.

ONTARIO COURT OF JUSTICE (GENERAL DIVISION)
DIVISIONAL COURT

ROSENBERG, MCKEOWN and BELL, J.J.

B E T W E E N)
LOU MORIN and SYBIL SHAVER) Janice B. Payne
and:) for the Applicants
ONTARIO NEW HOME WARRANTY PROGRAM) (respondents in appeal)
)
) Netanus Rutherford
) for the Respondent
) (Appellant)
) Heard:
) November 28, 1991

ROSENBERG, J., (Orally):

This is an appeal by the Ontario New Home Warranty Program (the warranty program) from the decision and order of the Commercial Registration Appeal Tribunal (the Tribunal) dated July 17, 1990.

The decision and order pertain to a claim made by the respondents under Section 14(1)(b) of the Ontario New Home Warranties Plan Act R.S.O. 1980 c. 350 (the Act) for compensation for breach of warranty in respect of a condominium unit owned by them. Upon a request for a preliminary ruling from the Tribunal as to whether the Notice of Claim has been submitted within the prescribed one-year warranty period the Tribunal held in the affirmative.

The Tribunal, therefore, directed the appellant to inspect the respondent's condominium unit and to decide upon the merits of the claim.

THE FACTS:

The respondents are the present owners of a condominium unit known as Unit 209 in a condominium building municipally known as 2109 Carling Avenue in Ottawa, Ontario.

On April 29, 1985, the declaration and description of the condominium building were registered under the Condominium Act R.S.O. 1980, c. 84, as Carleton Condominium Corporation No. 283.

Prior to April 29, 1985, the land, on which condominium building is situate, was owned by Twenty-Nineteen Carling Terrace Ltd., the developer. The developer was, at all material times, a registered vendor under sections 6 and 7 of the Act, and the condominium building was enroled under the developer's registration number pursuant to the Regulations under the Act.

On or about June 28, 1985, the developer transferred the title of Unit 209 to Peirvest Inc. As of that date, the unit was completed and ready for occupancy. The transfer to Peirvest Inc. was by way of a distribution of corporate assets. Peirvest Inc., as a 20-percent shareholder or joint venturer, received five units and assumed certain mortgage liabilities and other liabilities in consideration of the transfer. It is not alleged, nor was it argued before us, that the transfer was a sham; nor can it be said on the facts as recited that the transfer was an arm's length transfer.

While the representative of Peirvest who gave evidence was not sure if a Certificate of Possession had been completed, and the appellant was not able to produce a copy of the Certificate of Completion and Possession, for the purpose of these reasons, it is assumed that a Certificate of Completion and Possession was completed and filed with the appellant on or about the 28th day of June, 1985. In fact, the appellant's computer so indicated.

Between June 28, 1985 and October 17, 1986, the unit remained vacant. Peirvest Inc. possessed the keys to the unit and had exclusive control over access to the unit. Peirvest Inc. first attempted to sell the unit but when the unit could not be sold after a reasonable period of time, it was listed for sale or rent.

On or about October 17, 1986, Peirvest Inc. transferred title to the respondents and the respondents moved into the unit on November 5 or 6, 1986. By letter dated August 10, 1987, the respondents gave written notice of a claim for breach of warranty to the appellant. By letter dated September 17, 1989, the appellant rendered a formal decision wherein it disallowed the respondent's claim on the ground that the prescribed one-year warranty period had commenced on June 28, 1985 and, therefore, had expired prior to the date of the respondent's notice of claim.

The respondents requested a hearing before the Tribunal pursuant to section 16(2) of the Act. That hearing resulted in the decision appealed from herein. The Tribunal's reasons, in essence,

are found in the last two paragraphs of their decision, which are as follows:

The Ontario New Home Warranties Plan Act is remedial, consumer protection legislation and should be liberally construed, as was suggested by Mr. Justice R.E. Holland in the Meadows of White Oaks II Ltd. case, reported at 65 O.R. (2d) at p. 365.

Accordingly, this Tribunal concludes that the Applicants are the first occupants of the unit and should be in equity protected in their claims under the Act. Since their notice to the Plan was within one year of their acquisition of the unit, the Tribunal directs that the Program inspect the unit and decide upon the merits of the various claims made by Morin and Shaver.

STANDARD OF REVIEW

By virtue of the Minister of Consumer and Commercial Relations Act, R.S.O. 108-, c. 274, the standard of review under section 11(5) is as follows:

An appeal under this section may be made on the questions of law or fact or both, and the court may exercise all the powers of the Tribunal and for such purpose the court may substitute its opinion for that of the registrar or of the Tribunal or the court may refer the matter back to the Tribunal for rehearing in whole or in part in accordance with such direct as the court considers proper.

DECISION:

We should not be taken as agreeing with the reasons of the Tribunal but, by virtue of section 11 (supra), we have considered fact and law. By section 9(g) of the Act, "owner" means "a person who first acquires a home from its vendor for occupancy, and his successors in title." In our view, Peirvest Inc. was not a person who acquired this home for occupancy. They acquired this home as a distribution of corporate assets and for the purpose of resale. It was only after they were unable to sell that they listed the property for sale or rent.

Accordingly, we agree with the Tribunal's conclusion. This Act is consumer protection and should be liberally construed in order to provide that protection. Our decision is based on the particular facts before us.

The appeal is dismissed.

Following submissions as to costs:

I have endorsed the record of the Appeal Book "For oral reasons given, the appeal is dismissed with costs fixed at \$3,000.00."

ONTARIO COURT (GENERAL DIVISION)

BETWEEN:

PEPY'S DINING LOUNGE INC. (PLAYMATE)

Appellant

and

LIQUOR LICENCE BOARD OF ONTARIO

Respondent

BEFORE: CARRUTHERS, O'BRIEN, BELL, JJ

DATE: November 21, 1991

Endorsement:

This appeal is from a decision of CRAT dealing with a matter under the Liquor Licence Act. Accordingly it is restricted to a question of law.

Counsel for the appellant suggests that the question is whether CRAT was incorrect in determining that the conduct giving rise to the proposal to suspend the licence of the licence-holder was "an absolute liability offence".

In our view the decision of CRAT, and as well that of the Board, were not made on the basis that the situation which confronted the licence-holder amounted to "an absolute liability offence" as that term has been used in decisions of the Supreme Court of Canada in Regina V. Sault Ste. Marie and Regina v. Wholesale Travel.

Here there were violations of the terms and conditions of the licence which lead to the suspension. In arriving at that conclusion CRAT held that the responsibility of the licence-holder under the circumstances was absolute. Costs set \$700.00 to the respondent.

COURT FILE RE 1809/91

ONTARIO COURT (GENERAL DIVISION)

THE HONOURABLE MR. JUSTICE) THURSDAY, THE 21ST
))
BORINS) DAY OF NOVEMBER, A.D. 1991

B E T W E E N:

RICHMOND SQUARE DEVELOPMENT CORPORATION

Appellant

- and -

COMMERCIAL REGISTRATION APPEAL TRIBUNAL

Respondent

ORDER

This application made by the Applicant, Richmond Square Development Corporation, for an Order granting leave pursuant to Section 6(2) of the Judicial Review Procedure Act, and for an Order in the nature of mandamus, and for an Order in the nature of prohibition, was heard this day at Toronto.

On reading the Affidavits of Service of Nicholas Kornet; AND upon having read the Affidavit of Anthony H. Graat, Jr.; AND upon having heard the submissions of Counsel for the Applicant; AND upon no one appearing on behalf of the Commercial Registration Appeal Tribunal after proper service; AND upon finding that there is a risk that Richmond Square Development Corporation may be seriously prejudiced; AND upon finding that Richmond Square Development Corporation is a "person" within the meaning of Section 16 of the Ontario New Home Warranties Plan Act; AND upon finding that the Registrar of the Commercial Registration Appeal Tribunal had no authority to deny Richmond Square Development Corporation a Hearing pursuant to Section 16 of the Ontario New Home Warranties Plan Act; AND upon finding that the Commercial Registration Appeal Tribunal is required by Section 16(3) of the Ontario New Home Warranties Plan Act and by Section 17(2)(b) of the Ministry of Consumer and Corporate Relations Act to hold a Hearing at the request of Richmond Square Development Corporation;

AND upon finding that Richmond Square Development Corporation has been deprived of its rights under Section 16 of the Ontario New Home Warranties Plan Act ; AND upon finding that it would be unfair to allow a Hearing pursuant to Section 9 of the Ontario New Home Warranties Plan Act to proceed at this time,

1. This Court hereby grants leave to Richmond Square Development Corporation pursuant to Section 16(2) of the Judicial Review Procedure Act to proceed with this Application for Judicial Review before the General Division.

2. This Court hereby grants an Order of mandamus compelling the Commercial Registration Appeal Tribunal to hold a Hearing as requested by the Applicant, Richmond Square Development Corporation, pursuant to Section 16(2) of the Ontario New Home Warranties Plan Act.

3. This Court hereby grants an Order prohibiting the Commercial Registration Appeal Tribunal from holding the Hearing under Section 9 of the Ontario New Home Warranties Plan Act scheduled for December 6, 1991 until such time as a Hearing under Section 16(2) has been properly concluded.

4. This Court hereby orders that the Respondent Commercial Registration Appeal Tribunal, shall pay to the Applicant the costs of this application fixed in the amount of \$1,400.00.

COURT FILE RE 1809/91

ONTARIO COURT (GENERAL DIVISION)

THE HONOURABLE MR. JUSTICE) THURSDAY, THE 2ND
CARRUTHERS) DAY OF DECEMBER, 1991

B E T W E E N :

RICHMOND SQUARE DEVELOPMENT CORPORATION

Appellant

- and -

COMMERCIAL REGISTRATION APPEAL TRIBUNAL

Respondent

CARRUTHERS, J.
(Endorsement)

This is an application brought pursuant to Rule 38(12) to set aside the order of Borins J. dated 21 Nov. 91.

There is no dispute that no notice of that hearing was served upon the Ontario New Home Warranty Program ("Program") or the Middlesex Condominium Corporation No. 134 ("134"). It appears that the parties who were served, "CRAT" and the Ministry of A/G, did not appear through either a decision not to, in the case of CRAT or inadvertence in the case of the A/G.

There is a fairly long, and now somewhat complicated history to this matter. I first became involved in April of this year. I then determined that because all involved, including the building, was essentially London based, any litigation should be brought and determined there. I accordingly adjourned the matter to London.

I am somewhat surprised to learn that this application has been brought in Toronto. I am more surprised in this respect when I further learned that there had been extensive litigation heard or determined in London. This litigation involved all of

the parties mentioned above, including Richmond, the Program and 134.

In my opinion there can be little doubt that the Program and 134 should have been served with notice of the proceedings before Borins J. I have to believe that he'd dealt with the matter either on an emergency basis or at all, or, having done so, without placing restrictions on the manner in which CRAT proceeded.

In saying this I am prepared to accept for present purposes that Borins J. was correct in finding that Richmond was a "person affected" within the meaning of sec 16(2) of the Ontario New Home Warranties Plan Act. I have not found it necessary to deal with this issue on its merits because of his conclusion, notwithstanding some effort of counsel to have me proceed otherwise.

To my mind, given Richmond's status under Sec 16(2), there is no need for this court to bind the manner in which CRAT is to proceed. That tribunal will hear all of the evidence which the parties ask to put before it, and it agrees to accept. It will then deal with the issues under Sec.(9) or Sec. 16(2) on the basis of that evidence, or more strictly regarding the findings of fact which it makes on the face of all of the evidence and the submissions of counsel.

I am advised that CRAT is standing by along with all the witnesses who have been subpoenaed to attend "the hearing" scheduled to begin, today. I am satisfied that there is no need to have two hearings as the order of Borins J. appears to provide for.

An order may issue then setting aside the order of Borins J. in so far as it purports to dictate the manner in which CRAT is to proceed, namely, those words "as well, there will be an order prohibiting CRAT from holding the hearing scheduled under s.9 on Dec 6/91 until after a hearing under s.16(2) or 16(3) has been held".

With respect to costs it appears to me that it is just and proper under all of the circumstances that Program and 134 each receive their respective costs from Richmond, each assessed at \$2,800 and payable forthwith. The Attorney-General seeks no costs.

To my mind there is no question that had Richmond given notice of the proceedings before Borins J. to Program or 134, the parties would not be here today and that Borins J. possessed of

the whole story would not have done anything to have affected the hearing from having proceeded today.

The parties have to get on with the exercise of assessing the nature and extent of the defects, the application of the program thereto, the cost of repairing them and the responsibility for doing so. It seems to me that the interests of too many innocent people who have paid to obtain units in the building in question are not being dealt with properly because of too much "legal wrangling".

As well any further litigation arising between these parties which concern the building in question should unless it is impossible to do so, be heard in London in my opinion.

ONTARIO COURT OF JUSTICE
DIVISIONAL COURT

CALLAGHAN, C.J. MONTGOMERY AND O'BRIEN, J.J.

B E T W E E N)	
619513 ONTARIO INC. c.o.b. as	)	<u>W. Gerald O'Dea</u>
TIN-BO TRAVEL SERVICES	)	for the Applicant
and:)	
THE BOARD OF TRUSTEES OF THE)	
TRAVEL INDUSTRY COMPENSATION	)	<u>Michael D. Lipton</u>
FUND (under the Travel	)	for the Respondent
Industry Act))	
	)	Heard:
	)	November 13, 1991

CALLAGHAN, C.J., (Orally):

This is an appeal pursuant to s. 11(5) of the Ministry of Consumer and Commercial Relations Act, R.S.O.C. 274 as amended from a decision of the Commercial Registration Appeal Tribunal (Tribunal) dismissing the applicants appeal from the decision of the Board of Trustees of the Compensation Fund whereby the Board of Trustees dismissed the applicant's claim for compensation made pursuant to s.15(3) of the Schedule under the Regulations. At issue on this appeal is whether the applicant company can recover monies owing to it by Tin-Bo Travel Services Limited in the amount of \$108,004.85 from the fund which was established under the above-mentioned schedule.

The facts in this case are as follows:

In October 1985 the Applicant, 619513 Ontario Inc., purchased the Ottawa assets of Tin-Bo Travel Services Limited, including the use of the name Tin-Bo Travel Services and the Applicant thereafter carried on a travel agency and travel wholesaler business in Ottawa as Tin-Bo Travel Service (Ottawa).

Neither the Applicant nor any shareholder, officer, or director of the Applicant had directly or indirectly an interest in, or exercised any control over the activities of Tin-Bo Travel Services Limited. It was independent of the Applicant.

The Applicant carried on business in Ottawa and was independent of the Toronto based Tin-Bo Travel Services Limited.

The Applicant dealt in good faith and at arms length with Tin-Bo Travel Services Limited.

The Applicant had a business relationship with Tin-Bo Travel Services Limited. As a wholesaler the Applicant provided airline tickets to Tin-Bo Travel Services Limited for sale to its clients.

The Applicant's claim relates to two groups of airline tickets which as a wholesaler it provided to Tin-Bo Travel Services Limited as retailer for clients of Tin-Bo Travel Services Limited which tickets were used by the clients. The clients paid Tin-Bo Travel Services Limited but Tin-Bo Travel Services Limited did not pay the applicant for the tickets. The Applicant remains unpaid for these tickets as follows:

\$25,281.00 for March 1988 tickets to China.

\$84,073.00 for April 4/88 tickets for a China Tour.

The Applicant's arrangement for the sale of tickets to Tin-Bo Travel Services Limited was to provide the tickets requested by Tin-Bo Travel Services Limited by courier to Toronto together with an invoice for the tickets, and upon receipt Tin-Bo Travel Services Limited would forward by return a cheque to the Applicant in payment for the tickets provided. Prior to April 1988 no cheque was ever returned N.S.F.

The Applicant asserts that it did not extend credit to Tin-Bo Travel Services Limited.

All money was paid to the Applicant by Tin-Bo Travel Services Limited up to March 1988.

In March 1988 tickets to a value of \$24,489.40 excluding commission were provided by the Applicant to Tin-Bo Travel Services Limited for which Tin-Bo Travel Services Limited failed to provide payment as agreed. The Applicant was told that the cheque was in accounting and/or sent.

In March 1988 Tin-Bo Travel Services Limited had arranged to purchase from the Applicant 82 airline tickets to China on a promotional tour arranged by the Applicant with China Air. The departure date was April 4th, 1988. The value of these 82 tickets, excluding commissions was \$83,515.45.

Because the \$24,489.40 had not been received the Applicant refused to forward the 82 tickets for the China Tour to Tin-Bo Travel Services Limited without receiving a cheque for

\$84,073.00 as payment for the tickets. The tour was to leave Toronto on April 4, 1988.

The Applicant threatened not to deliver the tickets and to cancel the trip unless a cheque in payment was provided upon delivery of the 82 tickets. Tin-Bo Travel Services Limited agreed to provide the cheque upon delivery.

Anton Cheng, president of the Applicant Company flew to Toronto on April 1, 1988 (Good Friday, a holiday) and was provided with a cheque for \$84,073.00 by Tin-Bo Travel Services Limited. He then passed over the tickets, together with passports and visas to Tin-Bo Travel Services Limited. This cheque was deposited in the night deposit of the Royal Bank on Sunday, April 3, 1988. (Easter Sunday).

The cheque for \$84,073.00 was not certified. It could not be certified because all the banks were closed until April 4th. The Applicant was not concerned re the cheque at that time.

On or about April 6, 1988 the Applicant was informed that Tin-Bo Travel Services Limited had closed its doors to business and that it was bankrupt. On or about April 7th Anton Cheng was so informed while in China as leader of the tour.

Prior to April 10th, 1988 the Applicant was informed that the cheque dated April 4th, 1988 for \$84,073.00 would not be honoured and on April 12th, 1988 the said cheque for \$84,073.00 was returned N.S.F.

The Applicant paid China Air for the tickets by cheque on April 4th, after deposit in its account of the cheque for \$84,073.00 from Tin-Bo Travel Services Limited. When that latter cheque was dishonoured the Applicant borrowed money to deposit in its account so that its cheque to China Air for the tickets would be honoured.

The flight to China departed Toronto on Monday, April 4th, 1988 at 10:05 a.m. (Easter Monday). Anton Cheng went on the trip as tour leader. During the trip he was in possession of the passenger tickets.

The Applicant considered and could have cancelled the remainder of the tour either when it discovered that Tin-Bo Travel Services Limited had closed its doors or, when it discovered that the cheque was dishonoured and could then have gotten a refund of the monies both for the remaining ground portion of the tour and for the return air fares. It decided against cancellation and the passengers completed their tour. Most of the passengers departed

China on April 10/88. At least 31 departed China on April 17/88 or later that month.

The value of the return air fare was about \$400.00 per passenger. The total value of the ground portion was about \$30,638.00.

The Applicant was aware of the availability of the Travel Industry Act compensation fund to satisfy its loss if it occurred. Its president Anton Cheng was involved in a similar claim based on an N.S.F. cheque and outstanding invoice which was paid by the fund in 1984 when he was an employee of the claimant Company.

Tin-Bo Travel Services Limited was at all material times registered under the Travel Industry Act and a Travel Agent and was a participant in the compensation fund.

The Applicant 619513 Ontario Inc. was at all material times registered under the Travel Industry Act as a travel wholesaler and was a participant in good standing to the compensation fund as a travel wholesaler and was eligible to file a claim for compensation from the fund as a travel wholesaler.

The Applicant purchased and paid for rights to travel services from Air Canada and China Air for the purpose of resale. These rights are represented by the Airline tickets listed on pages 1, 2 & 3 of Schedule "A" to the Applicant's original claim for compensation and were provided for use by the clients.

The Applicant delivered the passenger tickets to the travel agent, namely Tin-Bo Travel Services Limited.

Tin-Bo Travel Services Limited as travel agent collected the full payment for each of the tickets prior to departure from the travelling clients (passengers) listed on pages 1, 2, & 3 of Schedule "A" of the Applicant's original claim for compensation.

All of the clients received their tickets and the travel services which they paid for.

Tin-Bo Travel Services Limited failed to pass any of the travelling clients money to the Applicant. The Applicant has remained unpaid for providing the service.

Tin-Bo Travel Services Limited was petitioned into Bankruptcy and the Applicant cannot collect from Tin-Bo Travel Services Limited payment for the travel services provided.

The value, less the commission, of the travel services provided by the Applicant for which it has not been paid is \$108,004.85 being:

- a) \$24,489.40 for March 1988 airline tickets and,
- b) \$83,515.45 for the April 4, 1988 China Tour.

The Applicant 619513 Ontario Inc. properly filed a Notice of Claim for Compensation with the Board of Trustees of the Travel Industry Compensation Fund under section 15(3) of the Schedule to Regulation 938 promulgated under s. 27 of the Travel Industry Act.

On December 20, 1988, the Board of Trustees rejected the Applicant's claim on the basis that the Applicant had extended credit to Tin-Bo Travel Services Limited, and that section 15(3) of the Schedule did not intend that there be compensation where credit had been extended.

The Applicant then requested a hearing by the Commercial Registration Appeal Tribunal as provided for in section 16(1) of the Schedule.

Following that hearing, on October 4, 1989 the majority decision of the Tribunal affirmed the decision of the Board of Trustees and disallowed the Applicant's claim on the basis that:

- (i) based on previous decisions of the Tribunal the Applicant did not qualify for participation in the fund since it had provided credit to the defaulting travel agent.
- (ii) the Applicant had failed to act prudently by supplying the tickets for the China Tour to the travel agent without a certified cheque.
- (iii) the Applicant should have withheld the tickets for the China Tour from the travel agent thereby putting the clients of the travel agent at risk and should then have supplied the tickets directly to the clients.

Section 15(3) of the Regulations provides as follows:

Where a participant who is a travel wholesaler has acted in good faith and at

arm's length with a participant who is a travel agent and the travel agent has failed to pass his client's money to the travel wholesaler and the travel wholesaler has, at his own expense, reimbursed the client or has provided the travel service contracted for but no paid for by the travel agent to the travel wholesaler, the travel wholesaler shall be entitled to claim for the refund of that portion of the client's moneys received by the travel agent that the travel agent failed to pass to the travel wholesaler, but in no event shall the travel wholesaler be entitled to claim any portion of such moneys that represent commissions.

It can be seen from that section of the Schedule, pursuant to Regulation 938, that a travel wholesaler is entitled to claim for a refund from the fund in the following circumstances:

- a) where the wholesaler has acted in good faith and at arm's length with the travel agent;
- b) where the agent has failed to pass his clients money to the wholesaler; and
- c) where the wholesaler has, at his own expense, provided the travel service contracted for but no paid for by the agent.

It was submitted to us that there was evidence from which we could infer that in the circumstances of this case the wholesaler had acted in bad faith. We see no basis for drawing such an inference from the materials before us. Accordingly, we are of the view that the criteria as above-mentioned have in the circumstances of this case been met.

The Tribunal, however, refused to admit the applicant in this case to be paid out of the fund. The Tribunal imported certain conditions into this Regulation that, in our view, do not exist in it. Those imported conditions related to the extension of credit and related to when a client must be found to be at risk before the wholesale qualifies to claim under the Fund.

Firstly, it is clear to us that the Regulation contemplates refunds to consumers under section 15(1) to travel

agents under section 15(2) and to travel wholesalers, as in this case, under section 15(3). There is nothing in the Statute or the regulations which defines "credit", and there is nothing in the Regulation which prohibits the granting of credit in circumstances such as those of the applicant in this case.

Had the Legislature intended to prohibit travel wholesalers from granting a limited form of credit, or from accepting non-certified cheques in order to be entitled to claim from the Compensation Fund it should have said so specifically and it is not for this Court to imply such conditions into that Regulation. A *foriori* it was not for the Tribunal to import similar conditions.

In its reasons, the Tribunal found that the wholesaler must be in receipt of actual funds from the agent before travel services are provided and that the travel services must be provided to the consumer at a time when the consumer is at risk. We see no provision in the legislation.

It can be said that the consumer is at risk until the wholesaler receives the money from the agent. The wholesaler who provides services prior to his actual receipt of funds from the agent is in fact providing services "at his own expense" when the consumer is "at risk". We see no requirement in the legislation for this condition as well.

On a plain reading of the section 15(3) in our view the applicant is entitled to claim from the Fund for the travel services provided but no paid for in both March and April of 1988 and insofar as we are concerned, there is nothing in the language of the Regulation or the Statute, or in the conduct of the appellant, which suggests that there should be a disentitlement.

In result, therefore, the appeal must be allowed and this court directs that the respondent Fund pay the total sum of \$108,004.85 together with interest thereon to the applicant forthwith. It will carry interest at the rate of 10% from December 20th, 1988.

I have endorsed the Appeal Book as follows: For oral reasons delivered, this appeal is allowed. The Compensation Fund is order to pay to the applicant the sum of \$108,004.85 with interest at 10% from the 20th day of December 1988. The Applicant is entitled to its costs of this application as against the fund, fixed in the sum of \$5,000 inclusive of disbursements. There are no costs to the Minister.

ONTARIO COURT OF JUSTICE(GENERAL DIVISION)CARRUTHERS, CAMPBELL, MCKEOWN, JJ.

IN THE MATTER OF The Motor	)	Simon Van Duffelen
Vehicle Dealers Act, R.S.O.1980	)	for the applicant/respondent
Chapter 299;)	
)	
AND IN THE MATTER OF The	)	Gail Midanik
Ministry of Consumer and	)	for the respondent/appellant
Commercial Relations Act,)	
R.S.O. 1980, Chapter 274)	
)	
AND IN THE MATTER OF)	
an appeal from the)	
Decision and Order of the)	
Commercial Registration)	
Appeal Tribunal released)	
February 19, 1990)	
)	
B E T W E E N:)	
)	
THE REGISTRAR OF MOTOR VEHICLE)	
DEALERS AND SALESMEN)	
)	
Appellant	)	<u>Heard:</u> February 13, 1992.
-and-)	
JAMES STOGDILL)	
)	
Respondent)	

CARRUTHERS, CAMPBELL, MCKEOWN, J. :

Although the Board appeared to err in its application of Section 11(d) and Section 15 of the Charter and perhaps is the basis upon which it differentiated the respondent from his employer, we are not satisfied that the Board erred in the result.

It based its decision on the totality of the respondent's

past conduct and addressed itself to all the matters complained of. Although we might not have come to the same conclusion, the result is within the general range in which reasonable disagreement is possible.

The appeal is dismissed. With respect to costs, we note that it was not until midway through this appeal that counsel for the respondent established that the Board and all parties had proceeded upon the wrong assumption that the respondent had failed to disclose pending charges under Consumer Protection Act. This, to our minds was a very significant matter in as much as it destroyed much of the appellant argument. For these reasons no costs.



388

File No.: 380/91

ONTARIO COURT OF JUSTICE
Divisional Court

B E T W E E N :

THE IONA CORPORATION

Applicant
(Appellant)

- and -

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent
(Respondent in Appeal)

ORDER DISMISSING APPEAL

The appellant has not perfected this appeal, and has not cured the default, although given notice under Rule 61.12 to do so.

IT IS ORDERED that this appeal be dismissed for delay, with costs.

DATED: November 25, 1991

A.P. Bridges

A.P. BRIDGES
Registrar,
Divisional Court

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389
ONTARIO COURT OF JUSTICE
General Division
(Divisional Court)

File No.: 101/90

IN THE MATTER OF a hearing before the Commercial Registration Appeal Tribunal pursuant to Section 16 of The Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350

BETWEEN :

THE ONTARIO NEW HOME WARRANTY PROGRAM

Appellant

- and -

MR. AND MRS. GARY THIBODEAU

Respondents

ORDER DISMISSING APPEAL

The appellant has not perfected this appeal, and has not cured the default, although given notice under Rule 61.12 to do so.

IT IS ORDERED that this appeal be dismissed for delay, with costs.

DATED: March 15, 1991.

A.P. Bridges
A.P. BRIDGES,
Registrar,
Divisional Court

INSCRIT A/ENTERED AT TORONTO

IN FILM No: 842
DANS FILM No:

ON/LINE 03191991

AS DOCUMENT NO. 752
A TITRE DE DOCUMENT NO.
PERIOD: 191

IN THE MATTER OF a CLAIM by

	<u>Decision date</u>	<u>Request date</u>
1. TONY BERTUZZI	July 7, 1989	July 13, 1989
2. MR. AND MRS. W. CAMPBELL	July 13, 1989	July 20, 1989
3. MR. AND MRS. C. HAZELL	June 30, 1989	July 9, 1989
4. MR. AND MRS. G. SCHRAM	July 13, 1989	July 31, 1989
5. GUY SEELEY	July 18, 1989	Aug. 4, 1989
6. NEVILLE SMITH	July 13, 1989	July 25, 1989
7. MR. AND MRS. M. RAY File #1	Mar. 29, 1989	Apr. 12, 1989
8. MR. AND MRS. M. RAY File #2 for damages	July 6, 1989	July 19, 1989

AND IN THE MATTER OF the DECISIONS of the Ontario New Home Warranty Program (the Corporation designated for the purposes of the Ontario New Home Warranties Plan Act), made pursuant to Section 14 of the Ontario New Home Warranties Plan Act
 TO DISALLOW THE CLAIMS IN PART.

TRIBUNAL:

JAMES R. BREITHAUPT, Q.C., Chairman, presiding
 TIBOR PHILIP GREGOR, Member
 D.H. MACFARLANE, Member

APPEARANCES:

(June 27) Wayne Campbell, appearing on his own behalf
 Clement Hazell, appearing on his own behalf
 Catherine Lyons, representing Ray, Schram, Seeley,
 and Smith
 Brian M. Campbell, representing the Ontario New
 Home Warranty Program

DATES OF HEARING:

4 December 1989; 5, 12, 13, 14, 15, and 16 February; and 17, 18, 24, 25, 26 and 27 April; 24, 26, 27, and 28 September; 1 and 2 October 1990; 6, 7, 8, and 11 February; 25, 26, 27 and 28 March, 1991; 24, 25, 26 and 27 June 1991.

REASONS FOR RULING

We have considered the submissions made by counsel for the four claimants, as well as by counsel for the New Home Warranty Program concerning the request for reply evidence to be called in three specific areas. In referring to the citation of Krause v. The Queen 29 C.C.C. (3d), we have considered the points raised at page 391 in that decision. Therein, it is stated that:

...rebuttal will not be permitted regarding matters that merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.

It is common in many decisions or in many matters of speaking to talk about things "at the end of the day". Here we are talking about matters at the end of thirty days of evidence before this Tribunal.

With respect to the submissions concerning evidence as to water damage, we note that nothing had been claimed in this hearing for any of the seven homes that are before us. No evidence has been introduced by any of the claimants along the way with respect to such damages. We believe it is too late to do so now in order to relate this point to the strength or weakness of the mortar.

With respect to deterioration, the Tribunal certainly agrees that something must be done for these homes and if nothing is done, the situation may well become worse than it may at present be. However, we feel that if reply evidence is brought forward in this instance by Dr. Suter, there is no question that the New Home Warranty Program will then seek a further adjournment to see if in their view, things are as bad or not as are predicted and the matter will never end. As a result, we feel that further evidence with respect to deterioration, after more than 150 exhibits in this hearing, will not tell the Tribunal anything more than it knows right now.

Finally, there is the matter of the length of time that the tuck pointing should last. We are informed and we have directly through the evidence of Mr. Pal and others, that at least several of these homes have had repairs done two or three times. There is no question before us that those events have happened. We again do not believe that we need further evidence on that matter. We accept those comments as being true; that repairs have been attempted with, at best, mixed success. Our decision will be based upon the evidence that we have had before us and we are going to have to decide as to the appropriateness of that type of repair or whether more substantial repairs may be required.

In conclusion, we feel that the three areas suggested by counsel for her clients, whereby further evidence would be brought before this Tribunal would be points that would confirm only material about which we have heard a great deal. As a result, we have decided not to have further evidence in reply.

Counsel have agreed that we will return on August 1 at 9:00 a.m. to commence the argument. We will hear from Ms. Lyons first and then, of course, from Mr. Hazell and Mr. Wayne Campbell; and from Mr. Bertuzzi, if he wishes as well; to make certain matters of argument before us. Then we will continue with the completion of argument by the New Home Warranty Program. This has been a lengthy hearing, and we appreciate the work that has gone into the preparations that all of you have made. It has not been easy for any of us to have these matters divided because of other commitments, because of the hearing schedule of this Tribunal and the increase of its work. Your patience in seeing through this whole matter is something that the members of the panel are quite mindful of. That being the case, we are adjourned until August 1, 1991.

JOHN BUZZIE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RONALD J. POIRIER, Vice-Chairman, Presiding
BARBARA J. NICHOLS, Member
D.H. MACFARLANE, Member

APPEARANCES:

JOHN BUZZIE, appearing on his own behalf

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 21 March 1991 Thunder Bay

CONSENT ORDER

Upon the application to the Tribunal by the Applicant John Buzzie and counsel for the Registrar of the Ontario New Home Warranty Program, for issuance of a Consent Order of the Tribunal pursuant to Section 4 of the Statutory Powers Procedure Act, R.S.O. 1980, Chapter 484, and having read the Terms and Conditions to the disposition of the proceedings without a hearing as evidenced by the execution thereof by the Applicant and the counsel for the Registrar of the Ontario New Home Warranty Program filed and attached hereto;

NOW THEREFORE THIS TRIBUNAL orders that the proceedings in this matter be and the same are hereby disposed of without a hearing on the basis of the terms and conditions set out and which are expressly made a part of this Consent Order.

This agreement is made on the 21st³⁹⁴ day of March, 1991.

BETWEEN:

JOHN BUZZIE
(hereinafter referred to as the "Applicant")

- and -

ONTARIO NEW HOME WARRANTY PROGRAM
(hereinafter referred to as the "Program")

Whereas the Applicant submitted a claim for damages to the Program pursuant to Section 14 of the Ontario New Home Warranties Plan Act, R.S.O., 1980, Chapter 350 (the "Act") with respect to the replacement of the entire concrete floor slab in the basement of the home municipally known as 224 Glengary Drive (the "Home");

And whereas pursuant to Section 16 of the Act the Program rendered a decision under Section 14 to disallow the claim;

And whereas the Program is in receipt of new evidence which supports the fact that work previously undertaken by the Program to correct a basement water penetration problem in the Home has not been completely successful;

Now therefore in consideration of the covenants herein contained and other good and valuable consideration, the parties hereto agree as follows:

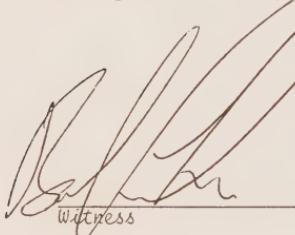
1. The Program shall perform or arrange for the performance of any and all work which it, in its sole and unfettered discretion, believes to be necessary to alleviate the basement water penetration problem at the Home, which work shall include providing an entire basement concrete floor slab.

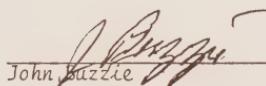
2. Subject to the availability of a qualified contractor or contractors to perform such work, weather and soil conditions, such work shall be performed not later than July 31, 1991.

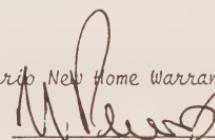
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3. The parties hereto hereby request that the Commercial Registration Appeal Tribunal (the "Tribunal") forthwith grant an order made pursuant to Section 4 of the Statutory Powers Procedure Act, R.S.O. 1980, Chapter 484, disposing of the proceedings presently before the Tribunal, which order shall include all terms hereinbefore referred to, to which the parties hereby consent.

This agreement is executed by the parties on the date upon which the agreement is expressed to have been made.


Witness


John Buzzie

Ontario New Home Warranties Program
per: 

CARLETON CONDOMINIUM CORPORATION #454

APEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
LUCIENNE BUSHNELL, Member
JOHN CORSI, Member

APPEARANCES:

JOHN TOPPARI, representing the Applicant

S. AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 1 August 1991

Ottawa

REASONS FOR RULING

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant, Carleton Condominium Corporation #454, from a decision of the Ontario New Home Warranty Program rendered by way of a letter dated November 16, 1990 to the Corporation declining its claims. The Condominium Corporation was represented at this hearing by Mr. Jack Toppari, an owner of one of the condominium units and a member of its Board of Directors. At the opening of the hearing, counsel for the Program brought a motion for an order that the Tribunal did not have jurisdiction to hear this appeal upon the grounds that the Applicant did not launch this appeal or authorize any one to launch the same within the time limited and, therefore, the appeal is not properly before the Tribunal. After hearing argument on behalf of both parties, the Tribunal granted the motion and stated that it would issue its reasons for so doing as soon as possible thereafter.

The facts and circumstances which give rise to this claim are unusual. On February 2, 1988 Mr. Jack Toppari entered into an Agreement of Purchase and Sale with C.W. Madigan Holdings Inc. to purchase unit 5, level 2, in a building which was to become the condominium in question here. The price to be paid for this unit and the use of one parking space was \$86,000.00. The condominium was duly registered on January 25, 1989, and Mr. Toppari's transaction was closed and he became the owner of his condominium in the regular way pursuant to the Condominium Act. There was

included in the Agreement of Purchase and Sale in clause (k) of paragraph 19 thereof a provision that Schedules "A", "B", "C" and "D" form part of the Offer and Agreement, and certain modifications are shown on schedule "A". These Schedules are, in fact, copies of the blueprints prepared for the condominium project. It appears that of 28 purchasers, Mr. Toppari was the one who had copies of these blueprints attached to his Agreement, and on the strength of this he claimed an interest in the common elements of the condominium above and beyond that of the other 27 owners.

It appears that C.W. Madigan Holdings Inc. got into trouble with this project and a large number of construction liens were filed against it. These lien holders took legal proceedings to enforce their claims and had a Trustee appointed under the Construction Lien Act for this purpose. We do not have the exact dates when the Trustee was appointed and when it was discharged but it is sufficient for our purposes in dealing with the matter to note that the Trustee was in place before the time Mr. Toppari first pursued his claim against the Ontario New Home Warranty Program which was by way of his letter of July 9, 1989 to the Program and that it was discharged probably in November of 1989 and certainly before December 18, 1989.

It appears from the material before the Tribunal that certain claims, other than those being pursued here by Mr. Toppari, were made on behalf of the Condominium Corporation upon the Ontario New Home Warranty Program and that these were settled, and it is the position of the Program that the resulting payment to the Condominium Corporation included compensation for the first item in issue here concerning entrance posts and that, therefore, no compensation is payable therefor. In view of the conclusion reached by the Tribunal upon this motion, we need not go further into this matter.

It also appears that Mr. Toppari first made a claim against the Trustee in a action or proceeding in the Supreme Court of Ontario. In his letter of July 9, 1989 to the Program he states in the second paragraph, "On 12 June 1989 a judge of Ontario Supreme Court rules that under the terms of the Construction Lien Act, the Trustees are not required to compensate me for breaches in my Agreement with C.W. Madigan Holdings Inc. My purchase price was, therefore, not reduced in consideration of incomplete and substituted items." In the last paragraph on that same page, he says, "I would appreciate you giving fair consideration to the above request since I originally tried to seek compensation from the Trustees rather than through the ONHWP" which indicates that in these proceedings in the Supreme Court, Mr. Toppari was seeking the same compensation, or compensation for the same items, as he is claiming here.

With a letter of June 4, 1991, Mr. Toppari submitted to the Registrar of the Tribunal a summary of Reasons for Requesting a Hearing, and at the bottom of the sixth page thereof, he details his claims based upon items Nos. 6, 9 and 10 in a report dated April 5, 1989 from a firm called Home Inspectors. The letter with which this report was forwarded is as follows:

"Home Inspectors

April 5, 1989

Mr. Jack Toppari
1033-B Cummings Avenue
Gloucester, Ontario

Re: Deficiency Items at 1033-B Cummings Avenue

It was a pleasure meeting with you on March 31, 1989 to review your concerns regarding your property,

Upon reviewing these concerns at 1033-B Cummings Avenue and examining the blueprints at City Hall, we compiled our enclosed report.

Also enclosed is our Invoice for services rendered to date.

With Thanks,

Paul Wilson
President"

We reproduce this letter here to show that at this stage it was Mr. Toppari personally and not the Condominium Corporation which was developing this claim. The three items of concern at this hearing are:

<u>"Item"</u>	<u>Observations</u>	<u>Recommendations</u>
6. Entrance Posts	<ul style="list-style-type: none"> - Pedestals under the entrance posts were called for in the blueprints. - No pedestals exist and the posts' end grain is exposed to water damage and rot. 	<ul style="list-style-type: none"> - Repair and build to blueprint specification or a cash compensation of \$150.00
9. Pipe Rail on Balcony	<ul style="list-style-type: none"> - Blueprints call for cedar caps for the balcony and for a pipe rail. Neither exist. 	<ul style="list-style-type: none"> - Install as per plans or a cash compensation of \$250.00
10. Private Outdoor Area	<ul style="list-style-type: none"> - Schedule B of the Purchase and Sale Agreements shows a private outdoor space for the unit at the front of the building. This space does not exist as indicated in Schedule B. 	<ul style="list-style-type: none"> - Due to the present construction and layout of the buildings no space for such a feature can be provided. A cash compensation of \$2500.00 should be considered."

It is agreed and conceded by both parties that these three items are common elements within the meaning of the Condominium Act. In his letter of July 9, 1989 to the Program noted above, Mr. Toppari states in the third paragraph "with the exception of item 1, all of the items are common elements, but for my exclusive use as stated in Schedule F of the Declaration".

The decision of the Ontario New Home Warranty Program with which we are concerned here was served pursuant to Section 16(1) of the Ontario New Home Warranty Plan Act by the delivery of the letter of November 16, 1990 to Carleton Condominium Corporation No. 454 and of a copy to Mr. Toppari. If a valid appeal was launched therefrom to this Tribunal, it had to be by way of Mr. Toppari's letter to the Tribunal of November 26, 1990. There is no document whatever from the Condominium Corporation in this

regard, and no other document from any person purporting to be for this purpose. There is no evidence before the Tribunal that the Condominium Corporation authorized Mr. Toppari or anyone else to launch this appeal or that it formed any intention to appeal within the time limited, namely 15 days. Indeed, the evidence which we have is to the contrary. The last document forming part of Exhibit 1 at this hearing is a copy of a letter dated November 23, 1990 from Mr. Toppari to one Gary Sandvik, who is said to be the President or Chairman of the condominium corporation, although he is not so addressed in this letter. There are a number of things in this letter which are important and it is therefore reproduced here.

November 23, 1990

J. Toppari
1033-B Cummings Ave
Gloucester, Ontario
K1J 9K6

BY FAX

Mr. Gary Sandvik
PMA Construction
1180 Evans Avenue
Ottawa, Ontario
K1H 7Z8

Dear Mr. Sandvik:

**Re: Carleton Condominium Corp. 454
Claim for Compensation by J. Toppari
From Ont. New Home Warrenty (sic) Program
Ref. #01-8705 (53489)**

This letter is in response to the ONHWP's decision regarding my claim for compensation re common element problems, dated 16 Nov. 90. I wish to have this decision appealed before the Commercial Registration Appeal Tribunal. As we discussed over the phone, if I am not otherwise informed by you or the Board of Directors by 29 Nov 90, I have permission from CCC # 454 to pursue this matter on its behalf. (Please note that because of the short 15 day appeal period I am forced to take this approach).

As I indicated, I will be fully responsible for any costs which may result from the Tribunal hearing. (I am not aware of any costs which may result - but I would like to give assurance nevertheless.)

I would also appreciate the Board, at its next regular meeting, passing a resolution in regard to the above. A suggested wording is:

'Carleton Condominium Corporation 454 agrees with Jack Toppari pursuing an appeal before the Commercial Registration appeal Tribunal, for incomplete common elements for 1033-B Cummings Avenue, Gloucester, Ontario, on behalf of the Condominium Corporation.'

I would appreciate a copy of the said resolution. Thank you for your cooperation in this trying matter.

Yours truly,

Jack Toppari

It is to be noted that in this letter, Mr. Toppari refers to "my claim for compensation" and not "your claim for compensation" or the claim of Carleton Condominium Corporation No. 454 for compensation. During his submission to the Tribunal, Mr. Toppari made it clear that the only response he had from Mr. Sandvik was that the Condominium Corporation would deal with his request at the next meeting of the Board of Directors (and he got no response from anyone else on behalf of the Condominium Corporation). It appears that this was exactly what happened and that on or about May 22, 1991, there were held a meeting or meetings of the Board of Directors and the Annual General Meeting of the Corporation. On May 22, 1991 Mr. Sandvik on behalf of the Board of Directors of the Corporation wrote a letter to Mr. Toppari advising of the passing of the following resolution at the Annual General Meeting.

"RESOLVED

Carleton Condominium Corporation No. 454 hereby authorizes Mr. Jack Toppari, owner of 1033B Cummings Avenue, Gloucester, to pursue appeals to the Commercial Registration Appeals Tribunal respecting the following items in the attached letter dated November 16, 1990 from the Ontario New Home Warranty Program:

Item A (#6) Pedistals (sic) under entrance posts

Item B (#9) Pipe railing on balcony

Item C (#10) Private outdoor area

The said appeals are herein called 'the appeals'. The within approval is provided on the following terms and conditions:

(a) The unit owner shall not carry out or cause to be carried out any alterations whatsoever to the common elements without

(i) the prior approval of the remaining unit owners under the terms of the Condominium Act (including section 38) and the Declaration and

(ii) the prior written consent of the Board of Directors of the Condominium Corporation.

(b) The appeals, and all matters related thereto, shall be at the sole expense of the unit owner.

- (c) The unit owner shall fully and completely indemnify and save harmless the corporation from any and all loss, costs, expenses, claims or damages, of whatever kind and however arising, in relation to the appeals.
- (d) Any amounts owing to the corporation by the unit owner by virtue of these terms and conditions shall be added to the unit owner's common expenses and shall be collectable against the unit owner, together with all reasonable costs, charges and expenses incurred by the corporation in connection with the collection or attempted collection collections of the amounts, in the same manner as common expenses, including by way of condominium lien in accordance with, the Act."

The following facts and conclusions therefrom appear clear to the Tribunal from the foregoing:

1. The three defects which are the basis of the claims at issue here are all defects in connection with common elements of the condominium.
2. Section 15 of the Ontario New Home Warranty Plan Act deems the Condominium Corporation to be the owner of the common elements and therefore only the Condominium Corporation can have any claims against either the builder or the Program under Sections 13 and 14 of the Act arising out of defects therein. The fact that one unit owner may have exclusive use of one or more such common elements, pursuant to a private agreement between himself and the Condominium Corporation and the other unit owners, does not constitute an assignment to him of the Condominium Corporation's rights under Section 15 of the Act.

3. This matter began with the letter of complaint to the Program of July 9, 1989 from Jack Toppari personally. It is very questionable whether this constituted a proper claim, pursuant to Section 15, to assert any rights which the Condominium Corporation may have had, pursuant to Sections 13 and 14 of the Act, as there is no evidence or indication that the Condominium Corporation authorized the making of this claim, or that anybody or person with authority to do so on its behalf, had formed any intention to have the claim made. However, by addressing its decision letter of November 16, 1989 to the Condominium Corporation, the Program may have waived this irregularity and put the Condominium Corporation in a position to pursue these claims by way of appeal if it wished to do so. The Tribunal does not have to make a determination of this issue because of its conclusion that the Condominium Corporation did not, in fact, pursue or attempt to pursue its claim by way of appeal.
4. On or about November 23, 1990 Mr. Toppari attempted to get authorization from the Condominium Corporation to pursue the appeal but he clearly did not do so. All he got was an undertaking by the President to have the matter brought up at the next meeting.
5. On November 26, 1990 Mr. Toppari wrote personally to the Tribunal referring to the decision of the Program of November 16, 1990 and stating, "I hereby appeal on behalf of Carleton Condominium Corporation No. 454 (See Annex II) this decision to the Commercial Registration Appeal Tribunal" Annex II attached to the letter with a copy of his letter of November 23, 1990 to Mr. Sandvik.
6. The Condominium Corporation through its Board of Directors or through any responsible officers (if these latter could form such an intention binding upon the Corporation) did not form any intention, one way or another, with regard to the bringing of this appeal until on or about May 22, 1990, long outside the time limited.
7. It is also clear to the Tribunal that, until he found that only the Condominium Corporation could make a valid claim for defects in common elements,

Mr. Toppari was pursuing this claim on his own behalf, first against the Trustee in some proceeding in the Supreme Court, and then against the Program in this proceeding, and it is clear from the terms and conditions attached to the Condominium Corporation's resolution of May 22, 1990 that it considers that this appeal is being brought for the benefit of Mr. Toppari and the Corporation protected itself against any work being done on the common elements without written consent of the Directors and of the other unit owners, and it also protected itself from being responsible for any costs whatsoever.

The Tribunal, therefore, reached the conclusion that the motion by counsel on behalf of the Program should succeed and finds that this appeal is not properly before the Tribunal and it does not have jurisdiction to hear the same.

CENTURY 21, ACCLAIM LTD.

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

AND

CENTURY 21 BRADWOOD REALTY AND BRIAN A. WILDING

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATIONS

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
A. DONALD MANCHESTER, Member

APPEARANCES:

R. WISE, representing the Applicants

DON BOURGEOIS, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF HEARING: 7 February 1991 Toronto

REASONS FOR RULING

The Tribunal has deliberated with respect to this motion and given it great consideration because if the Tribunal accedes to the motion put forward by Mr. Bourgeois the result, of course, is going to be rather serious for Mr. Wilding.

The Tribunal has considered the agreed upon facts as filed. It is acknowledged that a Proposal was initiated by the Registrar on June 8, 1990; one to refuse to grant the registration of Century 21 Acclaim Ltd. as a broker and the second, to revoke the registration of Century 21 Bradwood Realty Inc.

The most significant factor is that Mr. Wilding transferred his brokerage position to Century 21 Dominion Realty Sales Ltd. on June 20, 1990 and that his employment with that enterprise terminated October 3, 1990, although some of the correspondence might indicate dates other than that particular date. In any event, the sixty day period had elapsed as is provided under Section 13(15) of Regulation 891/80 when Mr. Wilding filed an application for employment with Century 21, Acclaim Ltd.

In addition to those specific facts, the application for Century 21 Acclaim Ltd. was dependent upon Mr. Wilding being a broker registered under the Real Estate and Business Brokers Act. In examining the Exhibits filed on his application, it is to be noted that there were very specific responses given to Mr. Wilding in a letter from the Ministry on November 2, 1990 - more than a month prior to the expiry of the sixty days.

That letter filed as Exhibit 3 indicated that it was in response to a letter from Mr. Wilding of October 26, 1990, and while that letter of October 26, is not before the Tribunal, there is reference to a concern by Mr. Wilding as to his loss of ability to earn his livelihood as a real estate salesperson. The letter, therefore, of November 2 is germane to the facts of this case in that it sets out the various processes whereby Mr. Wilding can have his brokerage licence continued, and as I indicated, this was more than thirty days before the expiry of the sixty day period.

There was some indication that Mr. Wilding had changed his address and that he did not receive the letter at the time or reasonably shortly thereafter from the date of its transmission. Nevertheless, a copy of that letter was sent to his solicitor and the Tribunal has to take note of the fact that once an individual is represented by legal counsel, that the facts, particularly when they are as seriously outlined as they are in this letter of November 2, would be discussed or should have been discussed between counsel and Wilding. It is, therefore, the view of the Tribunal that on the facts of the case, there was an obligation for Mr. Wilding to deal with the issue of continued employment or consult with the Registrar's office and while there is some indication that perhaps there may have been some consultation, there is nothing in writing filed before this Tribunal with which we can deal in that regard.

The Tribunal, therefore, has to look at the argument that has been put forward concerning the effect of the Regulations and as to whether they are regulatory only, of an administrative nature and not substantive. Certainly it is well established law that where in a statute, there is a difference between what is in a statute and a Regulation, the statute will govern.

In looking at this particular statute, however, the Tribunal directs attention to subsection 6(2) of the Act which stipulates that a registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the Applicant, imposed by the Tribunal or prescribed by the Regulations, and it is that last wording which is of significance as far as the Tribunal is concerned; prescribed by the Regulations.

When one considers the Regulations, it is found that there are a number of very substantive issues covered by the Regulations. Section 2 of the Regulations deals with the requirement of filing a bond and it states every application for registration shall be accompanied by such. It is obviously more than just an administrative matter. Furthermore, Section 18 of the Regulations provides for the temporary registration of estates and this is a substantive matter. There are other items in the Regulations which may be argued are not substantive, but the Tribunal finds that these are not such as to make the Regulations meaningless as far as registration of an Applicant by the Registrar is concerned.

In particular, in dealing with Section 13(15), it is significant to the Tribunal that there is a requirement for employment to be re-obtained within sixty days or a new application must be filed. It seems to the Tribunal that this section would be meaningless if it were merely regulatory and not substantive. What it does is it permits a registrant a sixty day latitude in which to become employed. Failing that the Applicant or registrant is not necessarily deprived forever of the ability to become registered, it is merely a requirement that he must file a new application with all the attendant investigations, of course, that flow from that. The view of this Tribunal is that the Regulations are important in dealing with the matters before it this day.

Further considerations by the Tribunal are the cases that have been cited to it. The Tribunal is aware that many of the regulatory statutes which come under its jurisdiction are similar in wording. There are variations, of course. There is a different wording, but nevertheless, the principles established in those statutes are, in the view of this Tribunal, similar. On that basis, the Tribunal is of the view that the decisions even though dealing with other statutes are of significance in considering the matter before it and in particular, therefore, even though some of the cases deal with the Motor Vehicle Dealers Act, they are of persuasive value to this Tribunal when dealing with the Real Estate and Business Brokers Act.

In that regard, the Tribunal looks with favour upon the decision in Christopher Blencowe decided December 10, 1980 in which the Tribunal in that case found that, as the registration had expired, the Applicant's registration was no longer valid and that no jurisdiction remained in the Tribunal to deal with that matter.

A similar matter occurred in the Cyril Barrette case where the registration had lapsed and again the Tribunal found as a fact that in 1983 it had no jurisdiction. The Real Estate and Business Brokers Act case of Jan Brandejs and Joseph Schurrer,

which was released in June of 1990, is of assistance as well to this Tribunal. In that decision, it was noted that Joseph Schurrer's registration as a real estate salesperson had lapsed before the hearing before the Tribunal. The second Applicant, Brandejs voluntarily surrendered his registration, but if he had not showed up, there is no doubt that the matter would have proceeded. The Tribunal would have had jurisdiction to deal with Brandejs, but not with Schurrer whose application had lapsed. The only significance in the Brandejs case is that at the time of the hearing, Brandejs virtually put the Tribunal out of its jurisdiction by voluntarily surrendering his registration.

It, therefore, appears to the Tribunal that in all the decisions in the regulated industries which have come before the Tribunal, there has been a requirement for registration to be in place in order to give jurisdiction to the Tribunal. In this case, the application of Century 21 Acclaim Ltd., for its application is dependent upon there being in existence a broker who is to be the principal shareholder.

At this point in time, February 7, 1991 on the hearing before this Tribunal, there is no broker registered and, therefore, it is the view of this Tribunal that there is no jurisdiction for it to hear the application of Century 21 Acclaim Ltd. Similarly in the case of Century 21 Bradwood Realty Ltd. and Brian Wilding, the fact that the registration of Mr. Wilding lapsed in December 1990 under the provisions of Section 13(15) of the Regulations creates the situation that there is no registered broker for whom jurisdiction can be asserted by this Tribunal.

Therefore, in respect to the motion made by the Ministry through its counsel, Mr. Bourgeois, the Tribunal rules that in respect to Century 21 Acclaim Ltd. as follows: Upon motion of counsel for the Ministry of Consumer and Commercial Relations, the Tribunal determines that it has no jurisdiction to hold the hearing. In the matter of Century 21 Bradwood Realty and Brian Wilding, upon motion of counsel for the Ministry of Consumer and Commercial Relations, the Tribunal determines that it has no jurisdiction to hold a hearing.

I might say that on behalf of my colleagues and me that we have concern that this still creates a problem for Mr. Wilding, but we are bound by the statute and have no alternative but to make the rulings that we have made. If there is any consolation to Mr. Wilding, Mr. Bourgeois has indicated that the new application which Mr. Wilding filed in December of 1990, will be given as prompt attention as possible and the Tribunal has been assured that the Registrar will follow through as expeditiously as possible with that application.

REAL ESTATE AND BUSINESS BROKERS ACT
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 431

IN THE MATTER OF the REGISTRATION of
RAMESH DHIR
as real estate salesperson

AND IN THE MATTER OF the PROPOSAL of the
Registrar of Real Estate and Business Brokers
pursuant to Section 9(1) of the Real Estate and
Business Brokers Act
TO REVOKE THE REGISTRATION
- Decision dated: 31st day of May, 1990;

AND IN THE MATTER OF a requirement for a hearing respecting the
said Proposal pursuant to Section 9(2) of the
Real Estate and Business Brokers Act
- Requirement dated: 9th day of June, 1990, by

RAMESH DHIR

Applicant

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

CONSENT ORDER

Upon application made this day to the Tribunal by the
Applicant, Ramesh Dhir, and counsel for the Registrar, Real Estate
and Business Brokers pursuant to Section 4 of the Statutory Powers
Procedure Act, R.S.O. 1980, Chapter 484, and having read the
Minutes of Settlement for the disposition of the proceedings
herein without a hearing as evidenced by the execution thereof by
the Applicant and Registrar filed and attached hereto.

NOW THEREFORE, this Tribunal orders that the proceedings in
this matter be and the same are disposed of without a hearing as
against the Applicant Ramesh Dhir on the basis of the said Minutes
of Settlement attached hereto and which are expressly made a part
of this Consent order.

IN THE MATTER OF the Registration of
Ramesh Dhir as a Salesperson;

AND IN THE MATTER OF the Proposal of
the Registrar, Real Estate and
Business Brokers Act to Revoke the
Registration of Ramesh Dhir;

AND IN THE MATTER OF a Hearing
before the Commercial Registration
Appeal Tribunal regarding the
Proposal to Revoke the Registration
of Ramesh Dhir, held on March 11,
1990.

Minutes of Settlement

WHEREAS a Statement of Facts was agreed upon and read into the record at the Hearing by the Commercial Registration Appeal Tribunal into the Registrar's Proposal to Revoke the Registration of Ramesh Dhir as a salesperson, which Statement included the following facts:

1. Ramesh Dhir breached clause 3(1)(c), Real Estate and Business Brokers Act by acting as an officer of Countrywide City Centre Realty Inc.; and

2. Ramesh Dhir failed to disclose to the Registrar that he was an officer of Countrywide City Centre Realty Inc., although he was required by the Real Estate and Business Brokers Act to make such disclosure.

NOW THEREFORE Ramesh Dhir and the Registrar, Real Estate and Business Brokers Act have agreed to the following suspension and terms and conditions to be included in an Order of the Commercial Registration Appeal Tribunal:

1. Ramesh Dhir be:

- (a) suspended for a period of 60 days from the date of the Order of the Tribunal, and
- (b) prohibited from contact in any manner with customers during that 60 day period.

Mr. Dhir would not be prohibited from receiving any commissions earned with respect to two transactions that are expected to close during the period of suspension, provided that no activity within the meaning of "trade" takes place.

2. The Registration of Ramesh Dhir shall be subject to the following terms and conditions:

- (a) Ramesh Dhir shall, without absence, attend at and successfully complete, within 4 months of the date of the Order of the Tribunal, the Real Property Law course and Segment II, Introduction course, both of which involve approximately 40 hours of instruction and an examination with a pass mark of 75%;
- (b) Ramesh Dhir shall attend, within 6 months of the date of the Order of the Tribunal, for the entire day three courses: Legal Update, Drafting the Offer, and Professional Standards, each of which is one day in length;
- (c) Ramesh Dhir shall file proof satisfactory to the Registrar that he has attended and successfully completed the courses mentioned in paragraph 2(a) and attended the courses mentioned in paragraph 2(b);
- (d) Ramesh Dhir shall not be an officer, director, shareholder, sole proprietor or signing authority of a real estate broker for a period of 5 years from the date of the Order of the Tribunal;
- (e) Ramesh Dhir shall not, directly or indirectly, act as a branch manager of a real estate broker for a period of 5 years from the date of the Order of the Tribunal;
- (f) Ramesh Dhir shall ensure that his employer broker files with the Registrar's Office bimonthly reports for a period of 2 years from the date of the Order of the Tribunal and semiannual reports for the subsequent 3 year period, within 15 days of the end of each reporting period;
- (g) The content of the reports mentioned in paragraph 2(f) shall include:
 - (i) copies of all transactions involving Ramesh Dhir,
 - (ii) broker's authorization for all advertisements made by Ramesh Dhir,

- (iii) copies of all complaints from customers and infractions of the relevant Real Estate Board and the broker's policies involving Ramesh Dhir,
- (h) Ramesh Dhir shall ensure that his employer broker files immediately with the Registrar's Office copies of the documents referred to in clause 2(g)(iii);
- (i) Ramesh Dhir shall supply his current employer broker with a copy of the Order of the Tribunal. If he transfers during the period of 5 years from the date of the Order of the Tribunal, to another employer broker, he shall provide that new employer broker with a copy of the Order at the time he is hired by the new employer broker.

3. Ramesh Dhir agrees "to terminate voluntarily his registration as a salesperson if he breaches the Order of the Tribunal or the Real Estate and Business Brokers Act.

SIGNED THIS 23 day of March, 1991

Ramesh Dhir
Witness

Ramesh Dhir
Ramesh Dhir

SIGNED THIS 8th day of March, 1991

Witness

Gordon J. Randall
Gordon J. Randall
Registrar


889362 ONTARIO LTD.
(SUN HOLIDAYS)

HEARING TO CONSIDER A MOTION BY THE
REGISTRAR WITH RESPECT TO THE COMPOSITION OF THE
PANEL TO HEAR THE APPEAL FROM THE ORDER OF THE
REGISTRAR UNDER THE TRAVEL INDUSTRY ACT FOR
IMMEDIATE TEMPORARY SUSPENSION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
GORDON R. DRYDEN, Vice-Chairman as Member
PETER BONCH, Member

APPEARANCES:

SAM SINGH, representing DEBI DURGI, its agent

ALVIN TORBIN, representing the Registrar
under the Travel Industry Act

MICHAEL D. LIPTON, Q.C., representing
the Trustee and Board of Trustees of the
Compensation fund under the Travel Industry Act

DATE OF
HEARING: 2 April 1991 Toronto

REASONS FOR RULING

At the commencement of the hearing, Counsel for the Registrar, on the basis of a Notice of Motion brought on March 28, 1991, applied for an Order that the hearing of the Registrar's Proposal to revoke the registration of and Order of Temporary Suspension of the registration of 889362 Ontario Ltd operating as Sun Holidays, dated the 14th day of July 1990, should continue to be heard by the same panel that held hearings into the proposal on the 26th, 30th, and 31st days of July 1990, the 23rd, 24th, and 27th days of August 1990.

In bringing the motion counsel for the Registrar under the Travel Industry Act relied upon the provisions of Section 7 of the Travel Industry Act and subsection 10(6) of the Ministry of Consumer and Commercial Relations Act contending that the hearing under Section 7 of the Travel Industry Act was the identical hearing required under Section 6 of the Travel Industry Act, and therefore the hearing having commenced under Section 7 must continue under Section 6 and the provisions of subsection 10(6) of the Ministry of Consumer and Commercial Relations Act required the original panel of the Tribunal, which had initially made a ruling

on December 7, 1990 to continue the temporary suspension under Section 7, to continue.

At the hearing before this Tribunal as presently constituted, with members none of whom had participated in the hearings in July and August, 1990, it was identified by the Applicant that a question of conflict of interest had been raised in the initial hearing with respect to one of the members of that panel and it is therefore appropriate for this Tribunal as presently constituted to consider not only the question of whether the hearing conducted under Section 7 of the Travel Industry Act is in fact the same hearing as required under Section 6 of the Travel Industry Act, but whether the issue of conflict of interest having been raised in the previous hearing was addressed and resolved by that panel of the Tribunal as then constituted.

In considering the import of Section 7 of the Travel Industry Act, one has to look at the time frame established under Section 7 of the Act in relation to the matters raised under Section 6. Section 7 has no application until the Registrar issues a Proposal under Section 6 and the applicant requires a hearing under the provisions of subsection 6(2) of the Travel Industry Act. If in fact the Registrar issues a Proposal under subsection 6(1) and no such notice is delivered within the fifteen day period Section 7 has no application whatsoever even if the Registrar has concurrently with his notice of proposal issued a temporary suspension of the registration.

If on the other hand the applicant has filed a notice under subsection 6(2) requiring a hearing, the temporary suspension order issued by the Registrar expires 15 days after the date of the notice requiring that hearing unless the hearing is commenced in which case the Tribunal holding the hearing may extend the time of expiration until the hearing is concluded. Unless the Tribunal therefore, deals with the issue of the temporary suspension within such fifteen day period the applicant would be entitled to resume business.

In considering what occurred on the hearing before the Tribunal which commenced on July 26, 1990 and continued through until August 27, 1990 resulting in the decision issued by the Tribunal on the date of December 7, 1990, this Tribunal has to consider what were the options open to the Tribunal in July 1990. It is the view of this Tribunal that the Tribunal so constituted in July could have proceeded to deal with the Registrar's proposal under Section 6 on its merits together with the Temporary Suspension Order issued by the Registrar concurrently. In fact, the Tribunal at that time chose to deal only with the issue of the temporary suspension continuation. Counsel before the Tribunal

today acknowledged in fact that with the consent of all Counsel before that Tribunal as constituted in July, (and all parties were then represented by Counsel) attempts were made to confine the evidence presented to the Tribunal solely to the issue of continuance of the temporary suspension. No objection was raised by any Counsel to this process at the time of the hearing or by way of appeal of the decision released on December 7, 1990. In the reasons for the ruling issued by the Tribunal as so constituted, on page two of that decision the Tribunal stated:

As explained to the participants, this panel of the Tribunal is not seized with the issues of the merits of the Proposal, but will only deal with the question of the extension of the time of expiration of the temporary suspension.

Counsel for the Registrar and Counsel for the Trustee and Board of Trustees of the Compensation Fund under the Travel Industry Act both conceded before this Tribunal that at the very least there are two segments to a hearing under the Travel Industry Act: the one with respect to the temporary suspension (which has been concluded), and the other, in respect to the merits (which is about to begin). The Tribunal as today constituted in considering the wording of Section 7 and the acquiescence of the parties and the Tribunal which issued its decision on December 7, 1990, finds as a fact that the parties and the Tribunal treated Section 7 as independent of Section 6. It is the view of this Tribunal that the hearings conducted in 1990 were in the nature of an interlocutory application to determine whether the temporary suspension should be continued or not.

Once that ruling was made on December 7, 1990 the question of the temporary suspension was finally determined and directed to continue until such time as the hearing under Section 6 on the merits was completed.

The decision having been made with respect to the continuance of the temporary suspension it was now agreed upon by all parties before the Tribunal that the hearing under Section 6 to review the Registrar's Proposal could now proceed. Such a hearing is of course a hearing *de novo* on the merits. Counsel for the Registrar submitted that some of the evidence which had been given on the previous hearing would also be applicable to the issue of the merits of the Registrar's Proposal and it would therefore be of benefit to have the Tribunal as then constituted continue as it would have already heard eleven days of evidence and some twenty witnesses in that regard. While it may be a

matter of convenience to the Registrar it is also possible that there may be evidence which was appropriate in respect to the continuance of the order of temporary suspension which may in fact be prejudicial to the applicant in a hearing on the merits. It is therefore possible that unwittingly the continuance of the same panel in a hearing which is to be conducted as a hearing de novo may unfairly affect the applicant and it is essential that justice be seen to be done as well as be done when an applicant's livelihood is being affected so drastically by reason of the Proposal of the Registrar.

It is the view of this Tribunal that the Tribunal in 1990 could have proceeded directly under the provisions of Section 6 of the Travel Industry Act or under the provisions of Section 7. In fact the Tribunal at that time with the concurrence of all parties proceeded under the provisions of Section 7. It is the view of this Tribunal that this option available confirms that Section 6 and Section 7 provide therefore for independent hearings. Counsel for all parties having elected to proceed under Section 7 it the decision of this Tribunal that it is not open to Counsel for the Registrar and the Trustee to now raise the issue that the hearing under Section 6 is a continuation of the hearing under Section 7.

Counsel for the Registrar argued before this Tribunal that the wording of the Order of December 7, 1990 supported the proposition that the "hearing" referred to in Sections 6 and 7 was the same hearing. The wording of the order to which he refers is contained in clause (ii): "and adjourns the hearing sine die.....".

It is the opinion of this Tribunal that the wording contained in the written reasons does not support such an argument. The Chairman clearly contemplated another hearing with possibly other panel members. Furthermore the wording in the order cannot run counter to the authority contained in the statute which in the view of this Tribunal permits a hearing under section 7 as well as a hearing under Section 6.

Having dealt with the severability of Sections 6 and 7 on a procedural basis it is not necessary for this Tribunal to deal with the question of conflict of interest raised by the applicant on this motion before us. In the event however, that this Tribunal is overruled in respect to its findings concerning the severability of Sections 6 and 7 of the Travel Industry Act it is appropriate for us to consider the question of conflict of interest. The Applicant (no longer represented by Legal Counsel) raised through its Agent a concern about the composition of the panel which will be enroled for the purpose of hearing the merits

of the Proposal of the Registrar under Section 6. It was conceded by Counsel for the Registrar and Counsel for the Trustee that the issue of conflict of interest of one of the members of the prior panel was raised on about the fourth day of what became an eleven day hearing and that the matter was disposed of by the Chairman in his chambers.

Before this Tribunal the Applicant through its Agent indicated that the decision of the Chairman to continue the hearing without dealing with the issue of conflict of interest was made because the matter was simply an interlocutory one dealing with the continuation of the suspension by the Registrar. While Counsel for the Registrar and for the Trustee do not entirely agree with the interpretation placed upon the decision to continue as indicated by the agent for the Applicant, the Tribunal must give consideration to the wording contained in the reasons for the ruling previously mentioned to the effect that the panel of the Tribunal was not seized with the issue of the merits of the Proposal but was only dealing with the expiry of the temporary suspension. In the view of this Tribunal the question of conflict of interest may not have been solely the reason for proceeding but the reasons issued by that Tribunal at least in part support the proposition that some consideration may have been given to that issue or at the very least the matter was not resolved because the Tribunal did not consider itself seized of the issue on the merits. No doubt in the view of this Tribunal that perception by the Applicant, whether correct or not, coloured any decision of the Applicant to appeal the continuation of the Temporary Suspension Order. This perception also reveals the reason for the applicant wishing to proceed with a panel otherwise constituted in dealing with the merits of the Registrar's Proposal under Section 6.

In the view of this Tribunal the Applicant must be entitled to a hearing free from any taint of bias. Rightly or wrongly the Applicant has been lulled into the position of believing, from a careful reading of the decision issued by the previous Tribunal, that a different panel of the Tribunal would be hearing the matter on its merits, and the first inkling that such would not be the case occurred subsequent to the issuance of the decision of the Tribunal of December 7, 1990, in the form of copies of letters from Counsel for the Trustee to the Tribunal. The Applicant however, had the benefit of letters in response from the Tribunal indicating that an alternative panel would be impanelled. Therefore the first opportunity for the Applicant to raise the question of prejudice in any effective way was on the return of this motion before the Tribunal today.

For the foregoing reasons the motion brought by the

Registrar is hereby dismissed and the hearing is adjourned to enable the Registrar or the Trustee to appeal this decision if so advised. If this decision is appealed then this application under Section 6 of the Travel Industry Act is adjourned sine die until there has been a disposition of the appeal. If there has been no appeal within the time limit prescribed by statute then any party to this proceeding may on proper notice bring the matter before this Tribunal. Until the conclusion of such hearing before this Tribunal the order continuing the temporary suspension of the Applicant's licence issued by this Tribunal on December 7, 1990 is continued.

I CONCUR WITH THE REASONS OF VICE-CHAIRMAN RICHARD STEPHENSON FOR THE RULING WITH RESPECT TO 889362 ONTARIO LTD. CARRYING ON BUSINESS AS SUN HOLIDAYS.

"PETER BONCH"

CONCURRING DECISION

by Gordon R. Dryden
Vice-Chairman, as Member

I have read the reasons of Mr. Stephenson, herein and, with respect, I concur with them. I wish to add some remarks as to my reasons therefore.

First on the issue as to whether the hearing held previously pursuant to Section 7 of the Travel Industry Act was in fact the hearing also contemplated and prescribed by Section 6 of the Act, I wish to make the following observation. In determining this issue both the rules of statutory interpretation and the rules of common sense dictate that the two sections should be read together and the whole of the directions laid down as to proceedings to be followed be determined. Such a reading of these two sections indicates clearly that when the Registrar has issued a Proposal to revoke a license, as he did here pursuant to Section 6 (1) and, with it, an order temporarily suspending the registration pursuant to Section 7, and thereafter the Registrant has, within the time limited, served the notice requiring a hearing pursuant to Section 6 (2), it is then open to the Tribunal to proceed with either of two different hearings. It may proceed with the hearing on the merits pursuant to the various subsections of Section 6 to determine what order should be made with regard to the Proposal, or it may proceed with what is, in effect, an interlocutory hearing only, pursuant to Section 7 to determine whether the temporary suspension should remain in place until the hearing on the merits is held. These are clearly two quite different hearings. Of course, in either case the hearing must be commenced within the fifteen days limited in section 7 if the temporary suspension is to remain in place.

It is my understanding that the Rules of Civil Procedure in Ontario should be applied to operations of this Tribunal where they are applicable and such rules provide that a judge or a panel of judges, hearing an interlocutory application in a case, is not seized with the case so that all future proceedings including the trial must proceed before such judge or panel.

That this was the view of the first panel and of the parties before it at that time is corroborated in certain respects. It is stated by the chairman on page two of his reasons:-

As explained to the participants, this panel of the Tribunal is not seized with

the issues of the merits of the proposal but will deal only with the question of the extension of the time of expiration of the temporary suspension.

Also we were informed that, while discussing the evidence presented during the eleven days former hearing for some other purpose, Counsel for the Registrar supported his request to submit all of this evidence, not on the grounds that the Tribunal was in fact proceeding with the main hearing on the merits, but rather on the ground that this evidence was also relevant to the issue of the continuation of the temporary suspension. I further understand that this division of the two hearings is the practice that the Tribunal has followed on a good many occasions in the past, and I understand that there has never been any exception taken to this practice by any party in the past.

Counsel for the Registrar and for the Board of Trustees for the Compensation Fund before us both argued that the hearing contemplated in section 7 was exactly the same hearing prescribed in section 6. The word "Hearing" is used five times in section 7, in some cases clearly referring to a hearing on the merits of the proposal and in some cases to one on the issue of extending the temporary suspension. This brings me back to where I began to the conclusion that a proper reading of the two sections together leads to the result that there is a choice of two different hearings to be held. It was open to Counsel for any of the parties at the opening of the hearing on July 26, 1990, to make submissions to the Tribunal as to with which hearing it should proceed. One can think of reasons why either the Registrant or the Registrar might wish to go either way, or to oppose the other's application to go either way. In this particular event all parties elected to go the route of an interlocutory hearing under section 7, and in my view neither can now take the position that the former panel was really proceeding with the hearing on the merits under section 6 and is seized with that.

However, if it should later be determined that the foregoing is not a correct reading of these statutory provisions, in my view there remains another completely compelling reason why a different panel of the Tribunal should hold the hearing on the Registrar's proposal on the merits. There is no doubt that the Registrant has a strong apprehension of conflict of interest and also of bias on the part of the previous panel. Upon the representations made to us on this point I would be hard put to make a finding of conflict of interest, and I see no support whatever for the allegation of bias but that is not the point or the issue. The issues are the apprehension in the Registrant's mind and the appearance generally to any one looking at certain

relevant circumstances which I shall outline.

On the fourth of the eleven days of hearings before the previous panel it came first to the realization of the Registrant that the Industry member of the panel had been involved in some previous business in which the Registrant had perceived (whether correctly or not) some animus against the Registrant. Counsel for the Registrant immediately raised the issue with the Chairman then presiding, and he, very properly, invited all Counsel to discuss the matter first with him in his Chambers without the other panel members present so that the known facts could be sorted out before anyone would make statements on these matters publicly before being aware of these facts which he might later wish he had known before making such statements.

There is some material difference in the version of what was said in those Chambers given to us on behalf of the Registrant and by the other Counsel. The representation on behalf of the Registrant was that the Chairman invited the parties to go on and complete that hearing they were holding as to the temporary suspension, pointing out to the Registrant's counsel that he should tell his client that this was all they were doing then, and, in any event, whatever was the result of this hearing another panel would hear the Proposal on its merits. In the event Counsel, for the Registrant received instructions from his client not to pursue the point further at that time and the matter was never raised publicly.

Counsel for the other parties do not agree that the Chairman put it in so many words that another panel would hear the matter on its merits. Which ever party is closer to being right upon its recollection on this point, it appears upon all the relevant surrounding circumstances that to force this Registrant to have the merits of the Proposal determined by the previous panel would create a real breach of the fundamental rule that not only should justice be done but it must also appear to be done - in this case by the Registrant and any of the public looking at the matter.

In his reasons issued on December 7, 1990, the Chairman used the words I quoted above in another context and I underline particularly the open phrase "As explained to the participants" Unless we reject completely that the Registrant is raising this whole point in good faith, and we have no basis for doing that, we have to accept the following facts:- that the Registrant was really concerned with these issues once the problem was realized after four days,- that the Registrant agreed to press the issue no further after whatever transpired in the Chairman's Chambers (and the only explanation we have for that is the one given to us on behalf of the Registrant),- that the Registrant

believed all along until very recently, when the Registrar raised this issue put forward in the notice of motion, that the hearing on the merits would be before another panel, - that the Registrant immediately reacted very strongly against this suggestion and came here pleading that the hearing would be before another panel where there would not be any apprehension of conflict of interest or of bias. In all these circumstances, in my opinion, it would be just wrong to force this Registrant on before the original panel.

ALBERT FACCENDA

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL:

RICHARD F. STEPHENSON, Vice-Chairman, presiding
MICHAEL E. LERANBAUM, Member
A. DONALD MANCHESTER, Member

APPEARANCES:

ALVIN TORBIN, representing the Registrar under
the Real Estate and Business Brokers Act

ALBERT FACCENDA, appearing on his own behalf

DATE OF
HEARING: 26 March 1991 Toronto

RULING

On motion by counsel for the Registrar for a directed verdict that the Applicant has not made out a case for his application by reason of Section 10 of the Real Estate and Business Brokers Act, and having heard the evidence by the Applicant and the Registrar, the Tribunal finds that the Applicant has satisfied the onus required under Section 10 of the Act and the motion on behalf of the Registrar is hereby dismissed.

The application is directed to proceed on its merits and is adjourned to resume on September 23 to 25, 1991 at the Tribunal's Chambers, 1 St. Clair Avenue West, at 9:30 a.m.

It is further ordered that all witnesses who are under subpoena are bound over to attend on the continuation of this hearing on September 23, 1991.

ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 350

IN THE MATTER OF a CLAIM by
LEON KOZIEROK
for damages

AND IN THE MATTER OF the DECISION of the
Ontario New Home Warranty Program (the Corporation
designated for the purposes of the Ontario New Home
Warranties Plan Act) pursuant to Section 14 of the
Ontario New Home Warranties Plan Act.
TO DISALLOW THE CLAIM
- Decision dated: 18th day of July, 1989;

AND IN THE MATTER OF a requirement for a hearing respecting the
said Decision pursuant to Section 16(2) of the Ontario
New Home Warranties Plan Act
- Requirement dated: 20th day of March, 1991.

LEON KOZIEROK
and

Applicant

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

CONSENT ORDER

The Tribunal, pursuant to the request of counsel, under the provisions of section 16(4) of the Ontario New Home Warranties Plan Act does hereby add as Parties to the Proceedings P.G.B. Holdings Ltd. and Jacadam Holdings Ltd., carrying on business as Barabco Construction; and hereby orders that the Ontario New Home Warranty Program pay in full settlement of all claims and possible claims under the Ontario New Home Warranties Plan Act by Leon Kozierok in respect to the property at 226 Forest Ridge Road in Richmond Hill the sum of \$32,500.00 on or before the 12th day of July, 1991 and thereafter P.G.B. Holdings Ltd. and Jacadam Holdings Ltd., carrying on business as Barabco Construction, reimburse the Program with the said sum of \$32,500.00.

T.P.C. MAYAN

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
A. DONALD MANCHESTER, Member

APPEARANCES:

T.P.C. MAYAN, appearing on his own behalf

CHRISTINA CHRISTOPHE, representing the Registrar
under the Real Estate and Business Brokers Act

DATE OF

HEARING: 11 June 1991

Toronto

REASONS FOR RULING

This was a motion, made on behalf of the Registrar, to, in effect, prohibit the Tribunal from proceeding with a hearing of this matter on the merits, on the grounds that the Tribunal lacks the jurisdiction to do so.

It is argued on behalf of the Registrar that the Tribunal lost its jurisdiction in this matter when the Applicant's "sponsoring" broker became incapable of continuing its "sponsorship" of the Applicant when its registration under the Act terminated. It is submitted by counsel for the Registrar that upon the termination of the registration of such "sponsoring" broker, Mr. Mayan's own application for registration as a salesman became "defunct" and "no longer an application." Furthermore, it is argued, the Registrar's Notice of Proposal is now superfluous, as it is a Proposal relating to an application which is now defunct. Accordingly, it is submitted, there is no application for registration or subsisting Notice of Proposal that the Tribunal is required to, or indeed able to, consider.

Mr. Mayan successfully completed his examinations under the auspices of the Ontario Real Estate Association on February 18, 1989. A few weeks later, on March 8, 1989, Mr. Mayan submitted an application for registration as a real estate salesman under the Act. His application was in the form provided by the Ministry of Consumer and Commercial Relations for this purpose. Section 1(2) of Regulation 891 under the Act provides that "An application for

registration...as a salesman...shall be in a form provided by the Minister". The form itself is not prescribed by the Regulations, nor do the Regulations set out any of the requirements of the application form.

The form utilized by the Ministry includes a section entitled "Certificate of Employer". The printed portion (English version) of this Certificate provides as follows:

Registered Name of Intended Employer

I _____ hereby certify that the information given by the applicant is to the best of my knowledge and belief true and request that the application be granted. I further certify that I will not employ the applicant as a registrant until I receive his/her certificate of registration.

Name of Authorized Signing Official _____

Signature _____

Title _____

Employer's Registration Number _____

The broker who completes this certificate on an application for registration is often referred to as the "sponsoring" broker, however, it is to be noted that the term appears in neither the Act nor the regulations. Moreover, neither the Act nor the regulations require an application to include the certificate of the intended employer or "sponsoring" broker. Rather, the requirement appears to be imposed by virtue of the form of the application that the Ministry has elected to employ.

The Act and regulations do clearly contemplate that a person may only trade in real estate as a salesman if he or she is registered as a salesman of a registered broker. The Act defines "salesman" as "a person employed, appointed or authorized by a broker to trade in real estate". Section 13(3) of Regulation 891 provides "A salesman may only be registered where he is the salesman of a registered broker". While it is clear that to be registered as a salesman, a person must be employed, appointed or authorized by a broker, there is no stipulation in the Act, regulations, or even in the Ministry's own application form, that

requires the "intended employer" named in the application to be the ultimate employer of the applicant at the point of registration. Indeed the certificate contains no promise of employment whatsoever on the part of the intended employer, rather the certifying broker certifies only that he will not employ the Applicant until he has the Applicant's certificate of registration in hand.

The Certificate of Employer in Mr. Mayan's application named Red Carpet Provincial Real Estate Co. Ltd. ("Red Carpet") as the "Intended Employer" and was signed by a Mr. Lino Rubino. Both Red Carpet and Mr. Rubino were registered brokers under the Act at the time that the Certificate was completed and executed.

It transpired that, for reasons not fully explained to the Tribunal, a long period of time elapsed before the Registrar came to a decision as to Mr. Mayan's application. Thus, it was not until September 18, 1990, over eighteen months after Mr. Mayan made his application, and, according to Mr. Mayan, after he made some twenty-five to thirty telephone calls to the Registrar's office, that the Registrar issued a Proposal to refuse to grant registration as a salesman to the Applicant. At the date of the issuance of the Proposal, both Red Carpet and Mr. Rubino were still registered brokers under the Act.

Mr. Mayan then requested a hearing by the Tribunal pursuant to Section 9(2) of the Act. Unfortunately, another long period of time elapsed before a hearing was scheduled for June 11, 1991.

In the interim, on May 17, 1991, the registration of both Red Carpet and Rubino terminated. By May 17, 1991, over two years and two months had elapsed since Mr. Mayan filed his application.

On May 29, 1991, Mr. Kavanagh, a registration officer with the Registrar's office, contacted the Applicant by telephone and informed him of the termination of the registration of Red Carpet and Rubino. Mr. Mayan testified that Mr. Kavanagh told him that he had until May 31, 1991 to obtain a new sponsoring broker. Mr. Kavanagh testified that he told Mr. Mayan on May 29, 1991 that he had until May 31, 1991 to file a new application, including a certificate by a new sponsoring broker. In any event, Mr. Mayan was unable to arrange for a new broker prior to the deadline imposed by the Registrar. Mr. Mayan requested additional time to arrange for a new broker to sponsor him, however, the request was not acceded to by the Registrar's office.

On the hearing date, the Registrar made the motion now under consideration. Mr. Mayan at that time produced to the Registrar and Tribunal, a letter dated June 10, 1991 on the

letterhead of Sutton Group Showcase Realty Inc., addressed to the Registrar. The letter reads:

We, Sutton Group Showcase Realty Corporation, are prepared to employ Mr. T.P.C. Mayan as a sales representative upon presentation of his valid real estate license.

Counsel for the Registrar submits that the letter is ambiguous and that in any event, the Applicant cannot substitute another broker in this manner, but must now file a new application. Counsel then proceeded to point out to the Tribunal that if Mr. Mayan does file a new application, he will not in any event qualify for registration under Section 14(3) of the Regulations unless he repeats the required courses of study and passes the examinations again as more than eighteen months have passed since the date of his last examination.

It is obvious that the disposition sought by the Registrar would be most unfair to Mr. Mayan. He did, after all, apply for registration only a few weeks after passing his examination. The fact that it took eighteen months for the Registrar to issue his Proposal was certainly beyond his control. The fact that he was unable to get a hearing date prior to May 17, 1991, was certainly beyond his control. The fact that his "sponsoring" broker's registration was terminated on May 17, 1991, before Mr. Mayan had his day in court, so to speak, was also beyond his control. Were the Tribunal to accept the argument of counsel for the Registrar, the result would be to effectively deprive Mr. Mayan of the hearing that he is entitled to under the Act.

However, the issue to be determined is not one of fairness to Mr. Mayan, but of the jurisdiction of the Tribunal to proceed with a hearing on the merits. The Tribunal's jurisdiction to hold a hearing is statutory stemming from Section 9(4) of the Act, which provides:

Powers of (4) Where an applicant or registrant requires
Tribunal hearing by the Tribunal in accordance with
where subsection (2), the Tribunal shall appoint
hearing a time for and hold the hearing and, on the
application of the Registrar at the
hearing, may by order direct the Registrar
to carry out his proposal or refrain from
carrying out his proposal and to take such
action as the Tribunal considers the
Registrar ought to take in accordance with

this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Registrar.
(emphasis added)

' The statutory provision is imperative, the Tribunal must hold a hearing where the Registrar has proposed to refuse to grant registration and the Applicant has required a hearing. In the face of the clear, unequivocal and mandatory language of Section 9(4), the Tribunal is of the view that it would take some equally clear statutory provision to derogate from the Applicant's right to a hearing before the Tribunal. Counsel has not been able to refer the Tribunal to any provision of the statute, regulations or other law that has such an effect.

Mr. Mayan's application was made in the form required by the Ministry. The Registrar issued a Notice of Proposal. Mr. Mayan required a hearing. The Tribunal totally rejects the contention that Mr. Mayan's application somehow became "defunct" upon the termination of the registration of Red Carpet and Rubino. As to whether or not the Registrar should or should not have to "accept" the substituted "sponsoring broker" is a matter which may, perhaps, be addressed in the course of the hearing on the merits. It does not, however, have any bearing upon the issue of the jurisdiction of this Tribunal. In result, the motion is dismissed and the Tribunal directs the hearing to proceed on the merits on a date to be fixed by the Registrar of this Tribunal.

ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO 1980, CHAPTER 350

IN THE MATTER OF the REGISTRATION of
PRESIDENTIAL HOMES (WESTFIELD ESTATES)
as Builder

AND IN THE MATTER OF the PROPOSAL of the Registrar under the
Ontario New Home Warranties Plan Act
made pursuant to Section 9(1) of the
Ontario New Home Warranties Plan Act
TO REVOKE THE REGISTRATION
- Decision dated: 12th day of October, 1988;

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to Section 9(2).
- Requirement dated: 24th day of October, 1988, by

PRESIDENTIAL HOMES (WESTFIELD ESTATES)

Applicant

and

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

BEFORE:

James R. Breithaupt, Q.C., Chairman, Presiding
Tibor Philip Gregor, Member
D.H. MacFarlane, Member

Upon the matter coming before the Commercial Registration Appeal
Tribunal on:

July 12, 14, 26, 27, 28, 31, 1989;
January 22, 25, 26, 29, 30, 31;
February 1, 2; and
October 22, 23, 24, 25, 29, 30, 31, 1990;
June 3, 4, 10, 11 and September 11, 1991;

in the presence of:

Ronald B. Moldaver, Q.C., representing the Applicant
Brian M. Campbell, representing the Ontario New
Home Warranty Program

ORDER

Presidential Homes (Westfield Estates) Limited ("Presidential") was incorporated as an Ontario corporation on July 16, 1986 and was registered as a builder under the Ontario New Home Warranty Program on October 3, 1986. Marty Schmerz is the sole Principle, Director and Officer of Presidential and has been a registrant under 19 other corporations with some 500 homes built since 1976.

This project was to build 32 homes in Stouffville, and the usual Vendor/Builder agreement was signed.

On April 26, 1989, the Ontario New Home Warranty Program gave notice of a Proposal to revoke Presidential's registration on the grounds of lack of sufficient technical competence. When the new homes were occupied, the Program became involved with 14 conciliations in the subdivision by mid-1988. Four particular properties formed the basis of the Proposal and these were for:

James Simm/Dr. Cynthia Trann	491 Aintree Drive
Mr. and Mrs. Anthony Soda	479 Aintree Drive
Mr. and Mrs. H.T. Kedney	359 Cam Fella Blvd.
Mr. Bert Starmans	339 Cam Fella Blvd.

The Program cash settled the Soda, Kedney and Starmans claims for \$16,000, \$24,500 and \$14,500 respectively. An offer was made to settle the Simm/Trann claim for \$10,800, but that offer was not accepted.

The Tribunal heard evidence for these properties and for Mr. and Mrs. Dale Bishop of 364 Cam Fella Blvd. as follows:

Starmanns	2 days
Soda in part	2 days
Adjournment	1 day
Simm/Trann	19 days
Bishop	1½ days
Settlement	½ day

26 DAYS

The Simm/Trann claim was fully reviewed as a hearing within the overall revocation hearing and a separate decision has been issued.

The Bishop claim was a separate hearing which was heard also within the overall revocation hearing and a separate decision has been issued.

Throughout the whole hearing, 152 exhibits were received. On the completion of the Bishop hearing, counsel for the Program and for Presidential informed the Tribunal that a settlement of the various issues was possible. This would relieve the Tribunal of hearing the completion of evidence in the Soda claim, the evidence in the Kedney claim and the detailed response to all of the issues by Presidential. The Tribunal had arranged eleven further days for that purpose. While the immediate six days could not be re-booked with other matters, the Tribunal did receive the advantage of being able to plan other hearings for the five days in December which had been booked.

From the evidence which the Tribunal did hear, it is noted that Presidential's concerns were often that settlements had been put together without strong estimates to sustain them. The Tribunal recognizes that obtaining several detailed estimates for repair work is not often possible and the experience of the conciliator inspectors is to be generally relied upon. However, the Tribunal does encourage the Program to make the resolution and acceptance of decisions and cash settlements easier for all concerned by having greater detailed estimates as well as photographs and other supporting material whenever possible.

UPON the application to the Tribunal by the Applicant and counsel for the Registrar under the Ontario New Home Warranty Program for issuance of a Consent Order of the Tribunal pursuant to section 4 of the Statutory Powers Procedure Act, R.S.O. 1980, Chapter 484, and having read the Consent dated the 7th day of November, 1991 to the disposition of the proceedings without further hearing as evidenced by the execution thereof by the solicitor for the Applicant, Presidential Homes (Westfield Estates) and counsel for the Registrar filed, and attached hereto.

NOW THEREFORE this Tribunal Orders that the proceedings in this matter be and the same are disposed of without further hearing as against the Applicant on the basis of the Consent attached hereto and which is expressly made a part of this Order.

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SCHEDEULE "A"

CONSENT

The parties hereby consent to an order on the following terms:

1. The Applicant shall pay the sum of \$61,250.00 (Sixty-one thousand, two hundred and fifty dollars and zero cents) to the Respondent on or before August 31, 1992. The sum includes payment on account in the amount of \$40,000.00 (Forty thousand dollars and zero cents) held by the Respondent, which shall be credited to the Applicant.

2. The Applicant shall abide by the decisions of the Commercial Registration Appeal Tribunal in respect of the Bishop and Simm claims and either perform the work or reimburse the Respondents in accordance with the aforesaid decisions, save that since the Applicant has appealed the Bishop claim to the Divisional Court, copy of Notice of Appeal attached hereto, the obligation of the Applicant in respect of Bishop is stayed pending final disposition of appeals in that regard.

3. Should the aforesaid decisions require work to be performed, the Applicant agrees to perform the work forthwith subject to paragraph 5 hereof. Should the decisions order the payment of a sum of money, the Applicant agrees to pay to the Respondent the amount therein before August 31, 1992, subject to paragraph 5 herein.

435
SCHEDULE "A"

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The parties hereby consent to an order on the following terms:

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3. Should the aforesaid decisions require work to be performed, the Applicant agrees to perform the work forthwith subject to paragraph 5 hereof. Should the decisions order the payment of a sum of money, the Applicant agrees to pay to the Respondent the amount therein before August 31, 1992, subject to paragraph 5 herein.

RICHMOND SQUARE DEVELOPMENT CORPORATION
AND MIDDLESEX CONDOMINIUM CORPORATION 134

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
LUCIENNE BUSHNELL, Member
KEN WILLIAMSON, Member

APPEARANCES:

M. PETERSON, representing
Middlesex Condominium Corporation No.134

P. DARYL WILSON, representing
Richmond Square Development Corporation
(on December 3, 1991)

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 3, 4, 5, 6, 10 December 1991 London

REASONS FOR RULING

The Tribunal has deliberated with respect to this matter, and we will deal with it in our decision in reference to the Proposal, the Notice of Proposal, which is located at tab 146 of Exhibit 37, and we will deal with the issues, first of all, with reference to the breaches of warranties, and the failure to respond to those warranties, and then we will deal with the question of failure to respond to contract obligations, and ultimately, we will then deal with the question of honesty, integrity and operations in accordance with law.

In order to deal with the question of the warranties, the Tribunal must first find that in fact there are deficiencies in the building located at 695 Richmond Street in the City of London, owned by Middlesex Condominium Corporation 134. In this regard, a deficiency punch list was produced by Kleinfeldt Consultants, and delivered to the Program on February 23, 1990. Resulting from that deficiency list, a number of conversations occurred between the Program and Richmond Square, the developer and builder; correspondence occurred, and a field inspection occurred in May of 1990 at a time when severe leaking was occurring.

The evidence submitted indicates that the deficiency report of Kleinfeldt Consultants was forwarded to Richmond Square on April the 12th, 1990, and this is revealed at tab 27 of Exhibit 36.

With respect to the problems which occurred in May on the upper floor of the building, resulting in substantial water damage, and it is interesting to note that Mr. Graat, later in the year, in a letter on behalf of a company owned by him, complained that no action had been taken with respect to this water damage following the inspection of the water damage, the Program indicated to Richmond Square that a conciliation meeting would be held. A date was obtained, and communicated to Richmond Square, which date was determined to be July 12, 1990.

Before the date for the conciliation, notice of which was sent on June 18, I believe to Richmond Square, there was communication from the President of Richmond Square requiring the Program to identify from the Kleinfeldt report what items were warrantable, and which were not. Quite properly, in the view of this Tribunal, the representative of the Program indicated that this was the very issue to be determined in the conciliation proceedings. Quite properly, in the view of this Tribunal, the representative from the Program could not so identify which were warrantable and non-warrantable items in the Kleinfeldt report prior to that conciliation proceeding, when the site and the structure built on the site were examined. All parties being the condominium corporation for the common elements, and the builder, Richmond Square Development Corporation, would have an opportunity to discuss with the conciliator, the appropriate warrantable or non-warrantable aspect of each item contained in the Kleinfeldt report.

Richmond Square Development Corporation did not attend with any representative other than its solicitor, and in fact, the solicitor was the sole representative of Richmond Square Development Corporation. After approximately one and a half hours, the solicitor for Richmond Square Development Corporation and the solicitor for the condominium corporation left the scene, expressing the position that these were technical matters, and that only those people technically proficient should be participating. It should be noted, therefore, that Richmond Square Development Corporation had ample opportunity to attend at the time of the conciliation with its appropriate staff or consultants, professionally qualified, to discuss the warrantability of the items in the Kleinfeldt report. They chose not to do so.

Naturally, therefore, a report would be issued, and in

fact, that report, under date of November 16th, 1990, which can be found at tab 11 of Exhibit 38, was issued. It followed the Kleinfeldt report in format, and clearly identified those items which were warrantable, and those items which were not.

It is the view of this Tribunal that subsequent events have not satisfied the Tribunal that those items found to be warranted in the conciliation report should in any way be removed from our decision as to warrantability. We therefore find as a fact that the items identified in the Program's report as being warrantable are, in fact, subject to warranty. At this hearing, there was an additional item, I believe, that was also identified as being now warrantable of a fairly minor nature, and it is our view, therefore, that all of the items as identified by Mr. Haskett, the witness for the Program, are in fact, warrantable under Section 14 of the Ontario New Home Warranties Plan Act.

Having found that, and it must be noted by this Tribunal that we cannot with certainty identify precisely the value of those items subject to warranty, the evidence was clear before this Tribunal that further work will have to progress in order to determine the extent of the warranty items, particularly in regard to the masonry veneer of the building.

The Tribunal, therefore, finds that there are warranted items in an amount of approximately \$1,900,000, but as indicated, this will have to be subject to examination in the course of rectification by way of repairs of these items.

The next item, therefore, which the Tribunal has to consider is whether these items, having been identified as being subject to warranty under the Act, have been corrected by the builder, Richmond Square Development Corporation.

Much evidence was put before this Tribunal on the first day and subsequently with respect to access to the building. The solicitor for the builder stated that it had attempted to rectify repairs, but had been denied access. The Tribunal finds in confirmation of its decision made on December the 3rd, that the evidence throughout the course of this hearing has clearly demonstrated a willingness on the part of the condominium corporation to permit access to the building, both for repairs, and for inspection. These issues of access had been raised back in the fall of 1990, and throughout 1991, up to the commencement of this hearing.

It is clear to the Tribunal, however, on the evidence, that the condominium corporation was prepared at all times to permit reasonable access, subject only to those terms which would

be consistent with protecting the reasonable enjoyment of the premises occupied by 204 unit-owners, or tenants of unit-owners. The Tribunal is satisfied that only on last-minute expiry of time limits did the representatives of Richmond Square Development Corporation take advantage of these rights of access.

In particular, much was made of the so-called final arrangements to permit Richmond Square Development Corporation to prepare for this hearing before the Tribunal, which resulted in arrangements for access to the site and building in October of 1991. It is clear from the evidence before this Tribunal that the condominium corporation was prepared to give ten full business days access to the premises. The evidence also indicates that if that would not be sufficient time, the condominium corporation was prepared to give further access.

How did Richmond Square Development Corporation respond? They allowed or sent an engineer or architect by the name of Ruebsam, to the site on October 7th, October 8th, and October 11th, three days, although they had been granted additional time if required. The evidence before us indicated that no other access was requested, and no report has been issued by Mr. Ruebsam, although in his letter filed before this Tribunal dated December 2nd, 1991, he indicated to the builder that he did not have sufficient time to conclude a report for this hearing.

In that regard, the Tribunal was most interested to question Mr. Kirkpatrick of Kleinfeldt Consultants with regard to the special examinations which he conducted on May 22nd and 23rd, and June 3rd, 4th, and 5th of 1991. This witness impressed the Tribunal as being knowledgeable and forthright in his testimony. He stated to the Tribunal that in his professional opinion, there was ample time for Mr. Ruebsam after October 11th, 1991 to prepare an appropriate report. In fact, Mr. Kirkpatrick stated to the Tribunal that a knowledgeable professional, such as Mr. Ruebsam, having the report of February 23rd, 1990, plus conducting his own visual inspection, would be able to produce a report in a much quicker space of time. The fact that no such report has been filed before this Tribunal is significant.

The Tribunal was also concerned about the question given in evidence as to access for the purpose of repairs. The Tribunal finds that Richmond Square Development Corporation professed on a number of occasions, its willingness to attend, and to effect repairs, but it also finds that there was evidence of little, if any, attendance on the site to effect such repairs. The Tribunal finds that the Program was most reasonable in allowing time to the builder to attend and commence effecting repairs. When one looks at the extent of the deficiencies which are warranted, it is the

view of this Tribunal that it was incumbent upon the developer to move with some dispatch, not to do simply some cosmetic items, but to deal with some very major matters. And in particular, the Tribunal notes that even Mr. Graat, in his letter to the condominium corporation in the fall of 1990, was bitterly complaining that action was not being taken for a period in excess of five months.

The Tribunal, therefore, is very impressed with the evidence of Mr. Haskett with respect to his field trip to the site on January 8th, 1991. First of all, it appears to the Tribunal that the Program was being most reasonable in giving the builder every opportunity to demonstrate a real attempt to commence rectification of the problems. Mr. Haskett's evidence before us indicated that a representative of the builder took him about the premises, and identified two holes cut in the swimming pool area, in the garage membrane, beneath the swimming pool, and the insertion of a drain to collect water from leaking areas. He noted that, in fact, these repairs had been effected from property owned by Richmond Square Development Corporation, without the knowledge, and without the consent of the condominium corporation.

In the view of Mr. Haskett, these repairs were inconsequential, and the Tribunal finds as a fact, given the extensive warrantable deficiencies on this building, its pool enclosure, and the garage membrane, that these repairs were not only insignificant, they were also extremely late in forthcoming. Evidence has been given that the building was registered as a condominium on March 1st, 1989. The fact that only minor repairs were being made as recently as January of 1991, indicates to the Tribunal that the builder was in fact in breach of the terms and conditions of its registration, and in particular Section 1, clause (3), and Section 1, clause (4) of Regulation 728.

The Tribunal, therefore, finds that these deficiencies as determined in the conciliation report, were warrantable, and that the builder has failed to indemnify the Program, or to diligently perform its obligations under the plan to effect repairs. It is the decision of this Tribunal, therefore, that at such time as these warrantable deficiencies are fully determined as to amount, that the builder, Richmond Square Development Corporation, do pay to the Program the amount of such costs including, not only an appropriate supervision cost which may be required, but administration fees in the normal practice of the Program in dealing with its builder members.

The Tribunal, therefore, finds that the Program has clearly proven the proposition established in paragraph 4 of its Proposal. The Tribunal also finds that the Program has clearly

proven the record of breaches of warranties, as set out in its paragraph three. Paragraph two of the Program's Proposal states that the registrant has shown a failure or an unwillingness to complete the performance of contracts, and specifically has failed, or refused to complete the agreements of purchase and sale of Helen Bodrug, John and Liane Ormond, Karen Mandel, and Shawna Granovsky.

Shawna Granovsky gave evidence before the Tribunal. She was subpoenaed to give evidence, but gave her evidence in a forthright manner. Section 14(1)(a) of the Ontario New Home Warranties Plan Act provides that a person who has entered into a contract with a vendor has a cause of action resulting from the vendor's failure to perform the contract. It is clear in the evidence before us that in the case of Shawna Granovsky, who has been found by the courts to have had a valid agreement of purchase and sale, which agreement was dated August 15, 1988, the vendor, Richmond Square, has failed to complete that valid contract, in spite of an Order for specific performance issued by the courts in Ontario. Shawna Granovsky has demonstrated, because her evidence was not contradicted, that she has suffered damages amounting to approximately \$50,000 when one takes into account the \$24,000 of deposit money, and her substantial legal costs. Therefore, she clearly has a claim for damages for failure to perform the contract.

Similarly, the evidence with respect to Helen Bodrug indicates that Mrs. Bodrug suffered at least \$5,000 in damages from the failure of Richmond Square Development Corporation to conclude its agreement of purchase and sale with her, based upon a spurious claim for a release of her lawful rights under the Ontario New Home Warranties Plan Act.

It is also to be noted that the other parties referred to, John and Liane Ormond, and Karen Mandel, have also been discriminated against by the builder, and in fact, in the case of the Ormonds, they too have a judgment for specific performance of an agreement which they entered into on November 27, 1987, which the builder has again failed to honour. The Tribunal, therefore, finds that the Program has clearly proven the charge stated in paragraph two of its Proposal.

Dealing with the acts of the corporation, as represented by its officers and directors, and in particular, that of Anthony Graat, its president and sole director, the Tribunal is of the view that this builder has clearly demonstrated a lack of honesty and integrity, and its failure to operate in accordance with law. The comments with respect to its failure to comply with the agreements of purchase and sale, to which we have previously alluded, and in particular, its failure to follow the provisions of an Order of

specific performance, given by a court of this province, clearly indicate a failure to observe the law of the Province of Ontario.

It is also to be noted that there are obligations of a builder selling units in a condominium building such as this, to retain monies in trust, and again, in the case of Shawna Granovsky, asserting her legitimate right to be informed, she has applied to the courts in Ontario, to be informed of the status of her deposits totalling \$24,000. Filed before this Tribunal have been a number of court proceedings with respect to this particular item, and in fact, the Tribunal notes that an Order was directed to Richmond Square and to its president to provide this information to Miss Granovsky. Both Richmond Square and Mr. Graat have refused to follow the Order of the Ontario Courts in this regard, and in fact, have both been held in contempt of those courts.

The Tribunal notes that these Orders for contempt are being appealed, but nevertheless, the Tribunal is of the view that this demonstrates through the whole course of action of Richmond Square and its president in dealing with Miss Granovsky, a lack of regard for the law of the Province of Ontario.

In this regard, in the course of the evidence that was presented to the Tribunal, it was indicated that considerable difficulty was experienced in examining the building to determine the deficiencies. This was stated by Mr. Kirkpatrick of Kleinfeldt, because of the lack of as-built drawings for the building. The Tribunal notes that under Section 26 of the Condominium Act of the Province of Ontario, when there is a turnover from what might be called the builder or developer's board of directors to the directors elected by the unit owners, there is a requirement under subsection 3 of Section 26, clause (f), that the builder turn over the as-built architectural, structural, engineering, mechanical, electrical, and plumbing plans.

Certainly, in the case of this building, had those plans been turned over, had they been prepared, which the Tribunal does not know, but if they had been prepared, and had been turned over to the condominium corporation, they would have greatly assisted it and its experts from Kleinfeldt Consultants, engaged to conduct the technical audit, in performing its function. No evidence has been specifically put before this Tribunal with regard to the cost that the condominium corporation has incurred by reason of this failure, but it is obvious, and the tribunal may take judicial notice of the fact, that if there is a lack of proper documentation put forward, additional work would have to be done, and accordingly, the Tribunal would view this failure of Richmond Square as having caused additional damages to the condominium corporation.

It is further evident in the view of this Tribunal that Richmond Square and its president are prepared not to pay any attention to the law of the Province of Ontario, whether it be the Condominium Act, or the Ontario New Home Warranties Plan Act.

With respect to the question of reviewing the honesty and integrity of this developer, and its submission to the law of the Province of Ontario, the Tribunal has looked at the individual items as set out in the Proposal in paragraph 1 by the Program. Clause (a) states that the registrant has arbitrarily required some, but not all purchasers of units, to execute releases as a condition of closing. The aforesaid releases purport inter alia to release the registrant from its warranty obligations, contrary to Section 13(6) of the Ontario New Home Warranties Plan Act.

Section 13(6) stipulates that the warranties set out in subsection (1) of Section 13, apply, notwithstanding any agreement or waiver to the contrary, and are in addition to any other rights the owner may have, and to any other warranty agreed upon. It clearly is the will of the Province of Ontario Legislature, that a builder cannot contract himself out of his responsibilities under the Act. The evidence before the Tribunal clearly indicated that the builder included in its Agreement of Purchase and Sale, substantial language purporting to so contract out of the Act.

Secondly, the builder then purported to require, as a condition of closing, the execution of a similar but independent release. In some cases, the developer required the release to go beyond simply that of releasing the vendor, but also to release other companies who may have had either management or some other service to perform for the condominium corporation and its unit-holders. The evidence before the Tribunal was clear, that in some cases, the builder delayed, in some cases, charged a penalty in the form of adjustments, and in some cases, refused to close transactions, notwithstanding that it was bound to do so.

This arbitrary approach to purchasers of units in this building is clear indication of a lack of honesty and integrity. In fact, the inclusion of this clause in the agreement and the production of releases, is clearly contrary to law. Furthermore, the Tribunal is concerned that in an agreement with the Program, the builder acknowledged that it would not use these releases against purchasers from it. The Tribunal is concerned in this regard as to the attitude and actions of the builder in dealing with Mrs. Bodrug, with the Ormonds, with Miss Granovsky, and with Miss Mandel.

Notwithstanding its agreement with the Program, the

builder continues not to deal honestly with these individuals. The builder has failed to complete the agreements of purchase and sale, and certainly on the basis of the evidence put before this Tribunal, particularly the decisions of the Ontario Courts with respect to the Ormonds and Miss Granovsky requiring specific performance, that there was no basis in law for the builder to continue to discriminate against these individuals on the basis of their failure to execute a release, which in law, it is not entitled to ask for.

The Tribunal is very much concerned as well with respect to the use by the builder of the technique of transferring units from itself to corporations owned and directed by Anthony Graat. These items are contained in the Program's Proposal paragraph 1(e) and (f). In the first instance, dealing with the transfer, the Tribunal notes that on at least two occasions, in evidence put before the Tribunal, Richmond Square Development Corporation had entered into agreements of purchase and sale prior to March 27, 1990 with purchasers, and these agreements were for new residential condominium units in this building. Without any knowledge or consent, Richmond Square Development Corporation transferred on March 27, 1990, a substantial number of these units.

The Tribunal finds that such a transfer was a breach of contract, but in addition, finds that the builder achieved benefits from these transfers, to which the builder was not entitled. In one particular instance, purchasers by the name of Panwar purchased a unit from Richmond Square which was to close on August 1st of 1990. Unknown to the Panwars, Richmond Square Development Corporation had transferred their unit on March 27, 1990 to a corporation owned by Mr. Graat, which was in fact subsequently the vendor corporation for registration purposes in August 1990. This matter came to light when the Panwars filed a claim with the Program sometime between March 27th and August 1st, 1991. In accordance with the terms of the Ontario New Home Warranties Plan Act, these claims, being within one year of the date of possession obtained by the Panwars, would in the normal course of events be covered under the warranty in the Act.

In dealing with the Program, Richmond Square Development Corporation, took the position that the first transfer, the Certificate of Completion and Possession, which was in fact signed by Mr. Graat, had occurred on March 27th, 1990. Therefore, the claims of the Panwars were out of time. The Tribunal cannot countenance such lack of honesty and integrity, and this even raises the question of compliance with law. To think that an innocent purchaser could have his or her statutory warranty abbreviated by the unilateral act of his or her vendor causes this Tribunal grave concern as to the honesty, integrity, and observance

of law of this builder, and of its principals.

In addition to that, under the terms of its agreement with the Ontario New Home Warranty Program, the builder was required to file a security bond with the Program to cover its obligations with respect to deposits on each of the 204 units in this building. In conjunction with the litigation between the Program and this builder, with reference to the purported releases which the builder was exacting from its purchasers, the builder, we are informed, cross-claimed for reduction in its security filed with the Program.

Evidence has been placed before this Tribunal that statutory declarations were filed with the Program up to June of 1990 indicating that units had been transferred, and accordingly the security could be reduced. Acting upon the undertaking of a solicitor acting for Richmond Square Development Corporation, the Program sent notice to the insurance company holding the bond in favour of the Program, authorizing that company to reduce the vendor's obligations to the Program.

Only subsequently was it determined that the builder had transferred units not to individual purchasers, but to corporations owned by Anthony Graat, and it was on the basis of these transfers that the Program released its security. The amount which appears to have been released was in the neighbourhood of \$980,000. Subsequently, a statutory declaration was filed with the Program indicating that all but seven units had been transferred. Additional documentation was filed with the Program to the point that in June of 1990, it was represented that all units had been transferred.

As we have seen in this hearing, there are at least two units which have not been transferred, notwithstanding an Order for specific performance by the Ontario Courts. This developer has put the Program, of which it is a member, at substantial financial risk. This is contrary, not only to its obligations under the Act, but it is also an indication of a lack of honesty and integrity.

In this regard, the Tribunal is very concerned with what if any part, may have been played by the solicitor involved, and it directs that a copy of this decision be forwarded to the Law Society of Upper Canada, together with what appropriate documentation has been placed before this hearing, so that, at least, an appropriate investigation can be conducted by the Law Society, and the solicitor given every reasonable opportunity to satisfy his governing body that he acted appropriately.

On the basis of this hearing, and the evidence which has

been submitted to it, the Tribunal has considered the decision which it made at the outset of the hearing to the objection raised by counsel for Richmond Square Development Corporation, in requesting an adjournment.

The Tribunal is fully satisfied that substantially, all of the documents to which counsel for the builder objected, were in the possession of Richmond Square Development Corporation, or its previous solicitors, in advance of the commencement of this hearing. The books of documents, therefore, filed as Exhibits 36 and 37, are, in the view of the Tribunal, documents which were readily available to Richmond Square Development Corporation, and its solicitors. Whether it chose to make them available or not is not the responsibility of counsel before this Tribunal, or the Tribunal.

In considering the documents which have been reviewed, or put forward in evidence, the Tribunal has come to the conclusion that approximately 102 of those documents were available, on their face, as against approximately 31 which may or may not have been available. It is difficult on the face of those documents, the 31 to which I refer, to be absolutely certain whether they may not have been in the possession of Richmond Square.

In any event, with respect to many of those documents, they appear to be simply covering letter documents, or other insignificant documents. Some of them appear to be in the nature of aides-mémoire, such as records of telephone conversations, which were used to refresh the memory of the witness, Mr. Haskett, from the Program.

With respect to the third volume, which was filed as Exhibit 38, these documents have been made the substantial substance of facts and evidence presented to this Tribunal. Having had the benefit of seeing these documents in the course of presentation of the evidence, the Tribunal finds, as a fact, that the principal document is that which was filed with the conciliation report, namely the Kleinfeldt Consultants' report, filed with the Program on February 23, 1990. The Tribunal finds that the subsequent detailed documents included in Exhibit 38, are simply expansions of items, clearly identified in the conciliation report. It is true that they become somewhat more specific, particularly in dealing with the drops, and visual inspections, and deconstructive testing relating to the masonry veneer of the building. But it is the view of this Tribunal that these documents are there for the purpose of assisting the Tribunal in attempting to determine the extent, in a monetary way, and in a photographic way, of those deficiencies clearly identified in the conciliation report.

As indicated at the outset of the hearing, the Tribunal was prepared to entertain objections from counsel to any of these reports during the course of the hearing, and to make an appropriate ruling. Counsel for Richmond Square, and in fact, its client, chose not to avail itself of this opportunity, and left the proceedings during that first day of the hearing. Nevertheless, during the course of the hearing, a representative from the London agents for counsel for the developer was present, and could have, at any time, brought any concerns that he might have had, to the attention of the counsel for the developer. The counsel for the developer chose not to avail himself of the opportunity to deal with those matters in this forum.

I think the third item which was raised by counsel was the question of access, and we have already dealt with that in the course of the proceedings.

And the final position which counsel put forward on the opening day of this hearing was the question of the balance of convenience. Having had the benefit now of the testimony of the various witnesses, having observed the failure of Richmond Square Development Corporation to observe the laws of the Province of Ontario, and in particular, its failure to respond to orders for specific performance, and having heard the evidence as to the urgency of the necessity of repairs to this building, and the fact that there are 204 unit-owners, this Tribunal is now firmly convinced that the balance of convenience rested in favour of the Program, the condominium corporation, and its unit-holders, including specifically, Miss Granovsky and the Ormonds; and so, having reviewed all of those matters with the value of the hindsight which has been provided by this hearing, the Tribunal confirms its ruling to deny the adjournment which it issued on December 3, 1991.

The Tribunal therefore, pursuant to the authority vested in it, directs that the Program effect the repairs required to the common elements of this condominium building, that it render an account for the cost, including administration charges, to Richmond Square Development Corporation, and that the corporation forthwith, or upon terms agreeable to the Program, pay such amounts assessed; and that the Program carry out its Proposal to refuse to renew the registration of Richmond Square Development Corporation, registration number 15-929.

SHEMCO LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
J. BEVERLEY HOWSON, Member
WILLIAM WATSON, Member

APPEARANCES:

DONALD C. SCHLICHTER, representing the Applicant
NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATES OF 18 April 1991 Kingston
HEARING:

ORDER

UPON consent of the parties hereto, it is ordered that
the Registrar carry out the Proposal to refuse to renew the
registration of Shemco Limited;

AND IT IS FURTHER ORDERED that this Order be issued
without prejudice to either the Registrar or Shemco Limited to
pursue any other rights which either party may have, including the
right of the New Home Warranty Program to seek indemnity with
respect to the claims in the Notice of Proposal.

DATED at the City of Kingston in the Judicial District
of Frontenac this 18th day of April, 1991.

ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO 1980, CHAPTER 350

IN THE MATTER OF the REGISTRATION of
686070 ONTARIO LTD.
(SUMMIT VIEW HOMES)
as Builder.

AND IN THE MATTER OF the PROPOSAL of the Registrar under the
Ontario New Home Warranties Plan Act
made pursuant to Section 9(1) of the
Ontario New Home Warranties Plan Act
TO REFUSE TO RENEW THE REGISTRATION
- Decision dated: 27th day of September, 1990;

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to Section 9(2).
- Requirement dated: 15th day of October, 1990, by

686070 ONTARIO LTD. (SUMMIT VIEW HOMES)
Applicant

and

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

CONSENT ORDER

UPON the application to the Tribunal by counsel for the Registrar under the Ontario New Home Warranty Program for issuance of a Consent Order of the Tribunal pursuant to section 4 of the Statutory Powers Procedure Act, R.S.O. 1980, Chapter 484, and having read the Consent dated the 26th day of June, 1991 to the disposition of the proceedings without a hearing as evidenced by the execution thereof by the solicitor for the Applicant, 686070 Ontario Ltd. (Summit View Homes) and counsel for the Registrar filed, and attached hereto.

NOW THEREFORE this Tribunal Orders that the proceedings in this matter be and the same are disposed of without a hearing as against the Applicant on the basis of the Consent attached hereto and which is expressly made a part of this Consent Order.

Released: July 3, 1991

COMMERCIAL REGISTRATION APPEAL TRIBUNAL.

B E T W E E N :

686070 ONTARIO LTD.
(SUMMIT VIEW HOMES)

Applicant

- and -

ONTARIO NEW HOME WARRANTY PROGRAM

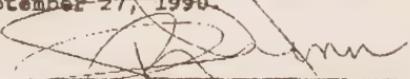
Respondent

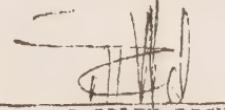
C O N S E N T

The parties hereto by the respective solicitors, consent to an order in the following terms:

1. The Applicant, 686070 Ontario Limited, shall pay the sum of \$20,000 to the Respondent, Ontario New Home Warranty Program (the "Warranty Program") within 30 days of the date of this order;
2. If the Applicant fails to comply with paragraph 1 hereof, the Registrar of the Warranty Program shall carry out his proposal dated September 27, 1990.

Dated: Jan 26¹⁹91


WOOLEY, DALE & DINGWALL
Per: Pat Dunn
Solicitors for the Applicant
686070 Ontario Limited


SHIBLEY RIGHTON
Per: Netanus T. Rutherford
Solicitors for the Respondent
Ontario New Home Warranty
Program

604842 ONTARIO INC.
(HOMESTEAD CONSTRUCTION)

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, member

APPEARANCES:

A.W. MC LAUCHLAN, agent for the Applicant

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 18 June 1991 Toronto

REASONS FOR RULING

In the presence of counsel for the Registrar under the Ontario New Home Warranties Plan Act, who strenuously objected, an application was made by Arnold McLauchlan, a principal of and agent for 604842 Ontario Inc. for an adjournment of the hearing. The basis of the Applicant's request for adjournment was that he or his counsel had not received notice of the appointment date, that there were to be settlement negotiations which did not occur and that, therefore, there could not be preparation for the hearing before this Tribunal.

Counsel for the Program indicated that she had spoken to Mr. McLauchlan a week ago only because there had been some indication that he might be retaining other counsel, that there had been no discussions with regard to a settlement meeting for last week and that, in fact, a letter from the Tribunal to Mr. Moldaver, the counsel for the Applicant, which letter was dated May 3 and filed as Exhibit 7, proposed dates of June 18 and June 24, 1991. Furthermore there was filed before the Tribunal, as Exhibit 8, an Affidavit of service of the Appointment For and Notice of Hearing upon the solicitors for the Applicant which Notice was forwarded by registered mail on May 14, 1991, to the law firm of Gordon Traub to the attention of Ronald B. Moldaver.

The Applicant's agent stated that he had not been informed of the contents of this Notice and that this Notice had

never been received, pointing out that the Affidavit indicated that the address for the solicitors was "5th floor, 20 Queen Street West, Toronto". An examination of the return acknowledgement card shows, however, that the Notice of Appointment had been received on the 9th floor by the firm of Gordon Traub and the Applicant must, therefore, be deemed to have received proper notice through his solicitors.

In view of the late request for an adjournment and the lack of availability of Tribunal hearings, but in order to give the Applicant every opportunity to advance its position, the Tribunal does hereby adjourn the hearing on the merits of this matter on the following conditions:

1. The Applicant pay into the Program Trust Account, in trust, the sum of \$18,174.41 on or before June 28, 1991.

2. Upon failure to do so, the Program may immediately cancel the Applicant's Certificate of Registration.

3. Upon payment of the sum as set out in paragraph 1 hereof, this hearing is adjourned peremptorily to August 12 and 13, 1991 at which time the Tribunal hearing the matter on its merits will determine the disposition of the monies held in trust by the Program pursuant to this Order.

The Tribunal informs the participants in this hearing that this motion being a motion for adjournment and not on its merits, the panel of the Tribunal hearing the motion is not seized of the matter and the panel hearing the matter on its merits may not necessarily consist of the same panel members.

URBANETICS LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding
DR. STEPHEN G. TRIANTIS, Member
JOHN HURLBURT, Member

APPEARANCES:

GLENN R. SOLOMON, representing the Applicant

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 8 May 1991

Toronto

REASONS FOR RULING

This is a motion by Urbanetics seeking an adjournment of the present hearing because of an application by a related company, Teron International Urban Development Corporation Ltd. ("TI"), for judicial review pending before the Divisional Court. The Applicant seeks to stay until judgment is rendered by the Divisional Court. The hearing before this Tribunal concerns a Proposal by the New Home Warranty Program to refuse to renew the registration of Urbanetics.

The uncontested facts giving rise to Applicant's motion are as follows:

Mr. Chris Teron and Mr. William Teron are directors and officers of the Applicant, Urbanetics, as well as of TI.

TI was builder of a condominium project in Ottawa, Ontario. The purchasers of the various condominium units formed a corporation named Carleton Condominium Corporation to represent their interests. The Corporation made a claim under Section 13 and following of the Ontario New Home Warranties Plan Act based on defects and deficiencies in the builder's work.

On November 29, 1989, the Program issued a judgment in which it agreed to pay Carleton Condominium Corporation a total sum of \$1,325,934.69 in consideration for the warranted items for which

the Program accepted responsibility. A copy of the judgment was sent by registered letter to TI (Exhibit 9).

TI, considering itself as a person "affected" by the Program's decision sought to appeal the decision before this Tribunal pursuant to Section 16(2) of the Act.

On August 15, 1990, the Registrar of the Tribunal sent a letter to the attorneys of TI, Exhibit 7, informing him that the Program's decision of November 29, 1989 was "a decision with respect to Carleton Condominium Corporation". The letter went on to state as follows:

Nowhere does it indicate that a decision has been made with respect to your client Teron International. In view of this, it would appear that the Tribunal has no jurisdiction to hold a hearing with respect to Teron International.

If there are circumstances of which I am unaware, I would appreciate hearing from you.

After receiving this letter, TI made no further representations to the Registrar, nor did it take any further steps to have the Tribunal hear the case. Instead, on September 26, 1990, TI issued an Application for Judicial Review before the Divisional Court asking for an order quashing the decision of the Program. In effect, it sought to set aside the judgment whereby the Program agreed to pay \$1,325,934.69 to cover warranted items under the Act. As appears in the application, TI alleges that the Program did not have the right or jurisdiction to undertake to pay the said amount to the Condominium Corporation.

In the interim, TI decided to not make an application to renew its registration with the Program. As a result, its registration lapsed in June 1988.

In 1990, Urbanetics made an application to renew its registration with the Program. On September 10, 1990, the Program issued a Notice of Proposal to refuse to renew Urbanetics's registration for the following reasons:

1. The past conduct of Mr. Chris Teron and Mr. William Teron directors and officers of Urbanetics Limited affords reasonable grounds for belief that the applicant's

undertakings will not be carried out in accordance with law and with integrity and honesty, TO WIT:

As directors and officers of Teron International Urban Development Corporation Ltd., Mr. Chris Teron and Mr. William Teron permitted that company to violate its statutory obligations which led to the Ontario New Home Warranty Program having to pay out of its Guarantee Fund the total sum of \$1,524,824.89 for warranted repairs. This all being contrary to the provisions of Section 4(4) subsection (2) of the Vendor/Builder Agreement executed by the above company.

On September 24, 1990, Urbanetics gave notice that it was appealing the decision by the Program and requiring a hearing by way of appeal before the Tribunal.

Pursuant to Urbanetics' request, the date of hearing was fixed for May 8, 1991.

On April 17, 1991, the attorneys for Urbanetics informed the Tribunal that Urbanetics would be requesting an adjournment of the proceedings. Its basis for so doing was:

The refusal of Ontario New Home Warranty Program ("ONHWP") to renew the registration of the Applicant is based upon the allegation that Mr. Chris Teron and Mr. William Teron, directors and officers of the Applicant, as directors and officers of Teron International Urban Development Corporation Ltd. ("TIUDCL") permitted that company to violate its statutory obligations. The decision of ONHWP giving rise to the alleged violation is currently the subject of an application to the Ontario Court of Justice (General Division), Divisional Court for Judicial Review.

It is our respectful submission that if the hearing before the Commercial Registration

Appeal Tribunal (the "Tribunal") is heard prior to the disposition of the application for Judicial Review, there is a serious risk of inconsistent decisions and irreparable harm and prejudice to the Applicant.

The Program in its letter dated April 25, 1991 objected to Urbanetics' motion stating:

It is the position of the Warranty Program that the Tribunal is the body empowered by statute to consider all issues regarding the continuing registration of this builder. We do not agree that the Tribunal should defer its consideration of the matter until the Judicial Review application is heard and determined.

Both parties appeared before the Tribunal on May 8, 1991 to make their submissions.

Before deciding on the merits of the motion for a stay in proceedings, it would be helpful to outline how the New Home Warranties Program Act operates in a case where the Program agrees to indemnify a buyer and the builder does not agree with the decision. As the Act is framed, when a buyer has a claim for defective work, he submits it to the Program. The Program will then carry out an inspection, usually in the presence of both the buyer and the builder. It will try to conciliate between the builder and the owner to facilitate a settlement but if it fails, will issue a judgment either accepting the owner's claim partially or completely, or rejecting it. The builder is also informed of the judgment.

If the owner is unsatisfied with the Program's judgment, he has a right of appeal to this Tribunal and thence by virtue of Section 11(1) of the Ministry of Consumer and Commercial Relations Act, a right of appeal to the Divisional Court.

If the builder is unsatisfied with the Program's decision, he does not apparently have a direct right of appeal before this Tribunal. What normally occurs is that the Program indemnifies the owner pursuant to its judgment and waits for the builder to make an application for renewal of its registration under the Act. When such application is received, the Program will refuse to grant renewal unless and until the builder indemnifies

the Program for all monies it has paid to the owner.

The builder then has the absolute right under Section 9(2) of the Act to a hearing before this Tribunal. By virtue of Section 9(4) of the Act, the Tribunal has the right to order the Registrar to carry out his Proposal or to refrain from carrying it out, and to take such action as the Tribunal considers the Registrar ought to take in accordance with the Act and Regulations. In effect, the Tribunal has the right to substitute its opinion for that of the Registrar.

As a result, the hearing permits the builder to contest in full the decision by the Program to make its payment to the owner. The builder may argue that the payment was unwarranted or excessive and if the Tribunal finds that this is the case, it will order the Program to renew the application of the builder without his being required to indemnify the Program or requiring him to partially indemnify the Program. In other words, the builder gets his day in court; he retains his right to contest in full the decision by the Program with which he is in disagreement.

This, however, did not occur with respect to TI and the Program. The sole reason for this was the decision by TI to allow its registration as a builder to lapse rather than to seek its renewal. This further resulted in TI's making an application for judicial review before the Divisional Court. In so doing, TI acted in a way which contravened the framework set out by the Ontario New Home Warranties Plan Act.

The Act clearly intends for the Tribunal to be the first judicial body to deal with appeals from decisions of the Program. It then allows an absolute right of appeal by the builder to the Divisional Court from any judgment of this Tribunal. To seek therefore to have the Divisional Court act as the first instance of appeal to a decision by the Program goes against the very spirit of the Act. It turns it, as it were, on its head.

Urbanetics argues that TI had no choice since its registration had been allowed to lapse. Does this mean, however, that all procedures should be put in reverse order with respect to Urbanetics simply because TI is presently before Divisional Court? Could not one better argue that because Urbanetics, by virtue of its appeal, is presently before the Tribunal, that the whole matter is now resolved in a way which truly satisfies the intention of the Act? In effect, TI will be getting the full hearing it wanted with respect to the Program's decision to indemnify the condominium owners and this before the very Tribunal it first sought.

The Tribunal also notes the length of time it took for TI to make its application for Judicial Review and to serve the proceedings on the Program. The Program complains that the purposes of the Act are frustrated by allowing for further delays and by depending upon the diligence of another corporation, TI, in allowing for the present hearing to eventually proceed.

The primary purpose of the New Home Warranties Plan Act is to protect consumers from builders who are not qualified or who lack integrity. This is to be contrasted with TI's application for Judicial Review which seeks to set aside a decision by the Program to indemnify a homeowner. The proceeding before this Tribunal deals with whether a different corporation, Urbanetics, is qualified to be registered as a builder in this Province. The latter proceeding deals with matters affecting the public welfare as opposed to a strictly personal issue.

The Tribunal rejects Urbanetics' motion to adjourn the present proceedings for the following reasons:

1. Section 9 of the New Home Warranties Act is formal in requiring this Tribunal to hold a hearing once a registrant asks for the Tribunal to do so. Urbanetics has made such a request. As contemplated by the Act, it is for the Tribunal to first render a judgment in appeal of a decision of the Program. It is only after the Tribunal has rendered its judgment that an appeal is allowed to Divisional Court.

Both judicial bodies have the fullest powers in hearing an appeal, including substituting their judgment in the stead of that of the Program. The Tribunal has the mandate to be the first to hear appeals from any decision of the Program. It has been set up specifically to do this and has developed an expertise in this field. (see the case of First City Financial Corp. Ltd. vs. Genstar, 33 O.R. 2d p.631.).

2. The Tribunal would be derelict in not accepting its responsibility to judge at first instance a decision by the Program. It could even be argued that in the case of TI the Divisional Court should stay its proceedings until a judgment is rendered by this Tribunal on the decision of the Program to pay the condominium owners. Once judgment was rendered by this Tribunal, TI and Urbanetics could appeal it directly to the Divisional Court which would then have the right to uphold, modify, or quash the judgment by this Tribunal.

3. TI and Urbanetics are two separate and distinct parties. The fact that TI may have a case before the Divisional Court should have no bearing on the case involving Urbanetics.

4. There is much that is problematic with the application for Judicial Review by TI. Is this Tribunal to suspend the present proceedings with all the delays that would result therefrom when so much is uncertain? The Tribunal thinks not. The balance of convenience clearly favours the Program.

5. The matters before the Tribunal and the Divisional Court are quite distinct. The matter before the Divisional Court seeks only to nullify a judgment by the Program to grant indemnification to condominium owners. The matter before this Tribunal deals with the overall competence and integrity of Urbanetics. It is possible that Divisional Court, because of a technicality, decides that the Program should not have paid the condominium owners, even while finding that the principals of Urbanetics were competent builders. The purpose of the Act is to protect the public from poor builders, irrespective of whether the Program succeeds in obtaining payment from the builder for alleged defects.

Because of the difference in the matters before each judicial body, a decision rendered by the Divisional Court may not be pertinent to the decision that this Tribunal must render. That is, it is far more likely that there will be no contradictory judgments resulting from continuing the present proceedings before this Tribunal. In any case, any decision by this Tribunal is subject to appeal to the Divisional Court and, as previously stated, the Act intends this Tribunal to hear in first instance any appeal of a decision by the Program.

6. The Applicant will suffer no prejudice because of this Tribunal's refusing his motion for adjournment. Any judgment rendered by this Tribunal can be appealed to Divisional Court and that appeal could be joined with TI's application.

7. The effect of this Tribunal consenting to the motion by Urbanetics would be to surrender its jurisdiction to decide first if a registrant has the right to be registered. If the Tribunal were to do this, it would be reasonable for any registrant who intends to ultimately appeal to the Divisional Court to ask this Tribunal to not hear his case, but rather to adjourn it and allow the registrant to go directly to Divisional Court. This makes no sense. The desire of the Legislature is clearly for this Tribunal to decide first.

Under the circumstances, the Tribunal dismisses Urbanetics' motion for adjournment and orders the Registrar to set down the case for a hearing on the merits on the first available date.

ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO 1980, CHAPTER 350

IN THE MATTER OF the REGISTRATION of
USSOLETTI CONSTRUCTION LIMITED
as Builder

AND IN THE MATTER OF the PROPOSAL of the Registrar under the
Ontario New Home Warranties Plan Act
made pursuant to Section 9(1) of the
Ontario New Home Warranties Plan Act
TO REFUSE TO RENEW THE REGISTRATION
- Decision dated: 15th day of January, 1990;

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to Section 9(2).
- Requirement dated: 1st day of March, 1990, by

USSOLETTI CONSTRUCTION LIMITED

Applicant

and

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

CONSENT ORDER

UPON the application to the Tribunal by counsel for the Registrar under the Ontario New Home Warranty Program for issuance of a Consent Order of the Tribunal pursuant to section 4 of the Statutory Powers Procedure Act, R.S.O. 1980, Chapter 484, and having read the Consent dated the 12th day of June, 1991 to the disposition of the proceedings without a hearing as evidenced by the execution thereof by the solicitor for the Applicant, Ussoletti Construction Limited and counsel for the Registrar filed, and attached hereto.

NOW THEREFORE this Tribunal Orders that the proceedings in this matter be and the same are disposed of without a hearing as against the Applicant on the basis of the Consent attached hereto and which is expressly made a part of this Consent Order.

COMMERCIAL REGISTRATION APPEAL TRIBUNAL

ONTARIO NEW HOME WARRANTIES PLAN ACT
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 350

BETWEEN:

USSOLETTI CONSTRUCTION LIMITED

Applicant

- and -

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

C O N S E N T

The parties hereto by their respective solicitors hereby consent to an order in the following terms:

1. The Applicant, Ussoletti Construction Limited shall pay the sum of \$4,000.00 to the Respondent Ontario New Home Warranty Program on or before Thursday, July 18, 1991.
2. If the Applicant fails to comply with paragraph 1 hereof, the Registrar of the Respondent shall carry out his proposal to refuse to renew registration as set out in the Notice of Proposal dated January 15, 1990.

Dated June 12, 1991


ROLAND J. BALDASSI

Solicitor for the Applicant,
Ussoletti Construction Limited


NETANUS T. RUTHERFORD

SHIBLEY RIGHTON

Solicitors for the Respondent,
Ontario New Home Warranty Program

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